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The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets

Harvey Reiter
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The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets

Harvey Reiter*

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The Federal Energy Regulatory Commission (“FERC”), formerly the Federal Power Commission (“FPC”), and the Federal Communications Commission (“FCC”), charged, respectively, with regulating key segments of the energy and communications industries, have undergone a remarkable role reversal. After years of resistance to the very notion of competition in the electric and gas industries, FERC has, with considerable vigor and consistency spanning nearly two decades, promoted policies to open access both to gas pipeline and high voltage electric transmission networks to downstream competitors of the network owners, i.e., to those who compete with pipelines and utilities in the sale of natural gas or electric power. FERC has stated plainly and repeatedly that the underpinning of these policies is that open access is essential to the protection of competition in the sale of the largely deregulated services reliant upon those networks.

By contrast, the FCC has done an about-face, reversing nearly forty years of policymaking to pry open cable and telecom networks and substituting a near total reliance on unregulated intermodal competition¹ among a handful of broadband providers to protect the public. The FCC’s purpose, stated plainly and repeatedly, is to ensure that regulatory burdens do not discourage investment in broadband technologies or deter its deployment.

This Article examines the forces that led to the development of FERC’s open access policies and explores the FCC’s policy shift and its philosophical underpinnings.² It concludes by questioning whether

1. This Article uses the terms intermodal and intramodal competition in the same manner as the FCC. The FCC defines intramodal competition “as competition among providers using the same type of facilities (e.g., incumbent and competitive Local Exchange Carriers (“LECs”), cable operators and overbuilders)” and intermodal competition as “competition among providers using different types of facilities (e.g., LECs and cable operators).” *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, at para. 85 n.314 (2002) [hereinafter *Cable Modem Declaratory Ruling*].

2. The Ninth Circuit, in *Brand X Internet Services v. FCC*, rejected FCC arguments that its decision essentially deregulating high-speed cable modem service involved a reasonable interpretation of ambiguous provisions of the 1996 Telecommunications Act and was entitled to deference. 345 F.3d 1120 (9th Cir. 2003). This Article does not address the merits of that argument (although it discusses at length the significance of the *Brand X* decision *infra*). But taking the FCC at its word, the FCC’s position implies that its interpretation could have gone either way. This Article *does* address the merits of the policy

differences in either industry structure or the regulatory schemes governing the energy and communications industries justify the FCC's hands-off policy, and offering suggestions for a different approach.

I. BACKGROUND

A. *FERC's Historical Resistance to Competition and Court Mandates*

The landmark 1934 Federal Communications Act ("1934 Communications Act")³ granted the FCC jurisdiction to regulate interstate telecommunications activities and companies. Among other powers, the FCC was given authority to control entry, to establish reasonable rates and terms of interconnection between telephone companies,⁴ and to grant

choice the FCC made in orders leading up to the *Brand X* decision. This Article also does not explore the complex issue of pricing methodologies, an issue that both agencies have grappled with in quite different ways. Pricing discrimination, of course, is implicated in the development of access policies and the Article does address the issue of discrimination as a significant means for limiting access. Nor does the Article explore the issue of intramodal competition between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). Although such competition depends on network access, this Article addresses only the downstream competition between broadband providers and their information service competitors.

3. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

4. For example:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common

applications upon a finding that “the public interest, convenience, and necessity will be served by the granting of such application.”⁵ As with other similar regulatory statutes, it also prohibits undue discrimination in the rates, terms, and conditions of service.⁶ Its stated central purpose is to make available an efficient communications service at a reasonable cost, consistent with the public interest, convenience, and necessity.⁷ These basic regulatory features remain in place under the 1996 Telecommunications Act (“1996 Act”),⁸ but that Act goes a step further. “It attempts ‘to eliminate the monopolies enjoyed by the inheritors of AT&T’s local franchises.’”⁹ As the FCC has put it, “the Telecommunications Act of 1996 introduced a mandate that the Commission promote competition, deregulation and innovation wherever possible in the communications market.”¹⁰

Enacted during the same era as the 1934 Communications Act, the 1935 Federal Power Act (“FPA”) and 1938 Natural Gas Act (“NGA”) grant FERC the power to regulate wholesale sales and transmission of, respectively, electricity and natural gas in interstate commerce,¹¹ in a

carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

47 U.S.C. § 201 (2002).

5. 47 U.S.C. § 309(a).

6. *See, e.g.*, 47 U.S.C. § 202(a) (2002).

7. Specifically, the FCC was created:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 151 (2002).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

9. *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004) (emphasis in original) (quoting *Verizon Comm., Inc. v. FCC*, 535 U.S. 467, 476 (2002)).

10. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, para. 35 (2002) [hereinafter *Wireline Broadband NPRM*].

11. 16 U.S.C. § 824(b)(1) (2002) (stating that “provisions of this Part shall apply to the

manner similar to the power granted the FCC by the 1934 Communications Act.¹² Sellers of regulated services, as in the communications industry, must offer service without undue discrimination and under rates, terms, and conditions that are just and reasonable.¹³ Mergers and licenses or certificates subject to FERC's jurisdiction must likewise satisfy a "public interest" or "public convenience and necessity" standard.¹⁴ For much of the FPC's history, natural gas service was marked by stable, relatively low prices and electric service was characterized by steadily declining prices. Thus, although it has long been settled that the FPC, like the FCC and other regulatory agencies, had a duty to consider anticompetitive impacts of utility proposals in its public interest deliberations,¹⁵ FERC (and its predecessor, the FPC) took few steps to protect, much less promote, the limited competition extant in those industries.¹⁶ Indeed, even when pressed,

transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce"); and 15 U.S.C. § 717(b) (2002) (stating that "the provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale. . .").

12. The similarities among the Federal Communications Act, the FPA, and the NGA are attributable not only to the fact that they were adopted in the same era, but that they were all modeled on the Interstate Commerce Act governing the regulation of railroads and oil pipelines. *See* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956); *St. Michaels Utils. Comm'n v. Fed. Power Comm'n*, 377 F.2d 912, 915 (4th Cir. 1967).

13. 16 U.S.C. § 824d(a) (2002) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable. . ."); 15 U.S.C. § 717c(a) (2002) ("All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable. . .").

14. 16 U.S.C. § 824b(a) (2002) ("[I]f the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same."); 15 U.S.C. § 717f(e) (2002):

[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that . . . the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. . . .

Id.

15. There is a recurrent theme in utility regulation reflecting the notion that, even in a regulated industry, competition should play a significant role. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *See also* NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976).

16. Congress plainly envisioned a significant role for FERC in protecting competition. The Supreme Court has described the "history of Part II of the Federal Power Act [as

“[i]t apparently took several trips to court, including two to the Supreme Court, to fully convince the FPC of its statutory mandate to consider antitrust policy in the public interest equation.”¹⁷

B. Origins and Evolution of FERC's Policies Regarding Access to Gas Pipelines and Electric Transmission

1. The Convergence of Consumer and Supplier Interests in Opening Networks

FERC's historical reluctance notwithstanding, changing industry conditions in both the electric and natural gas industries forced it to reexamine its regulatory approach. Beginning in the early 1980s, partial deregulation of natural gas prices under the Natural Gas Policy Act of 1978,¹⁸ intended to spur gas production and alleviate gas supply

evincing] an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.” *Otter Tail Power Co.*, 410 U.S. at 374. It has also characterized the agency's role as the “first line of defense against those competitive practices that might later be the subject of antitrust proceedings.” *Gulf States Util. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 760 (1973). There is no real dispute, however, that for much of its history FERC did precious little to fulfill this role. FERC has offered a benign retrospective explanation for its inaction on competition questions:

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

Through much of the 1960s, utilities were able to avoid price increases, but still achieve increased profits, because of substantial increases in scale economies, technological improvements, and only moderate increases in input prices. Thus, there was no pressure on regulatory commissions to use regulation to affect the structure of the industry.

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,543 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) [hereinafter *Promoting Wholesale Competition*].

17. Harvey L. Reiter, *Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation Under the Federal Power and Natural Gas Acts*, 18 LAND & WATER L. REV. 1, 4 n.11 (1983) (citing *Fed. Power Comm'n v. Conway Corp.*, 425 U.S. 271 (1976) [hereinafter *Competition and Access to the Bottleneck*]; *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747 (1973); *N. Natural Gas Corp. v. Fed. Power Comm'n*, 399 F.2d 953 (D.C. Cir. 1968)).

18. 15 U.S.C. §§ 3301-3432 (2002).

curtailments, led to ill-advised over-purchases of expensive gas supplies by interstate pipeline companies and dramatic increases in the cost of gas to industry and consumers.¹⁹ This combination of huge gas surpluses at a time of rising prices, coupled with pipeline refusals to transport lower-priced gas supplies to willing buyers, brought increasing pressure to bear on FERC by an unusual coalition of state utility commissions, consumer groups, independent gas producers, gas distributors, industrial consumers, and intrastate pipelines.²⁰ All of these groups had coalesced around the view that access to transportation service by interstate pipelines was essential to limit what they saw as the excessive economic power of those companies.²¹ These pressures led FERC, over the remainder of the Twentieth Century, to engage in a series of far-reaching rulemaking proceedings that have dramatically altered the structure of the natural gas industry.

At nearly the same time, but at a somewhat slower pace, the dynamics of the electric industry were also creating pressure for change. Municipal utilities and rural electric cooperatives were geographically surrounded by their private utility counterparts and typically reliant on them for most of their power supplies. Municipal utilities had pushed for years for the right to purchase the transmission service needed to secure alternative power supplies.²² Although they met with some success in the late 1960s and into the 1970s,²³ including one notable Supreme Court victory,²⁴ there was little overall change in an industry structure where most energy was purchased

19. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985) (codified at 18 C.F.R. pts. 2, 157, 250, 284, 375, and 381); Harvey L. Reiter, *Is the Pipeline's Certificate Obligation an Impediment to Competition in the Natural Gas Industry?*, 5 J. OF ENERGY L. & POL'Y 217 (1984) [hereinafter *Pipeline Certificate Obligation*].

20. See, e.g., *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 994-95 (D.C. Cir. 1987), *remanded sub nom. Am. Gas Ass'n v. FERC*, 888 F.2d 136 (1989).

21. See *Competition and Access to the Bottleneck*, *supra* note 17, at 16-20. See also, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, *Order No. 636*, FERC Stats. & Regs., Regs. Preambles Jan. 1991-June 1996, ¶ 30,939, at 30,389 (1992) [hereinafter *Order No. 636 Preambles*], *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

22. *Competition and Access to the Bottleneck*, *supra* note 17 at 5-10, 78-79.

23. *Id.* at 78 (discussing the Nuclear Regulatory Commission's attachment of "wheeling" conditions to numerous nuclear power plant licenses under Section 105(c) of the Atomic Energy Act). The Supreme Court defined "to 'wheel' power" as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility. . . ." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973). See also *Promoting Wholesale Competition*, *supra* note 16; *Toledo Edison Co.*, 10 Nuclear Reg. Rep. (CCH) 265 (Sept. 6, 1979); *Consumers Power Co.*, 6 Nuclear Reg. Rep. (CCH) 892 (Dec. 30, 1977).

24. *Otter Tail Power Co.*, 410 U.S. 366.

from utilities that produced their own electricity. As with the natural gas industry, it was a convergence of consumer and supplier interests that precipitated more dramatic changes.

The same energy crises of the 1970s that led to the passage of the 1978 Natural Gas Policy Act (“NGPA”)²⁵ also led, that year, to passage of the Public Utility Regulatory Policies Act (“PURPA”).²⁶ The most significant feature of PURPA was a provision obligating utilities to purchase the output of independently owned power plants that either relied on renewable energy sources (e.g., water, biomass, or solar energy) or produced electric energy and a commercially-viable thermal output (e.g., steam for heating) as part of a combined “cogeneration” process.²⁷ At the same time, changes in technology created the new possibility of efficient power production with much smaller units, while expansion of the transmission network had made transmission over long distances more economical.²⁸ Creating the perfect storm, utilities were already under pressure as a result of overconstruction of large-scale power plants, major cost disallowances in connection with cancelled nuclear power plants, increased difficulties in siting new plants, consumer backlash from dramatic increases in utility rates, and the defection of major industrial customers—who supplied their own power with PURPA plants.²⁹ The convergence of these factors led FERC to initiate policies that reshaped the industry, first through individual adjudications, and later through major rulemaking initiatives.

a. Gas Pipelines

i. Minimum Commodity Bill Regulation

FERC’s first tentative steps to encourage competition in the supply of natural gas came with the initiation of a rulemaking proceeding in 1983 to examine the reasonableness of minimum commodity bills that were ubiquitous in gas pipeline tariffs in the early 1980s. Most pipeline tariffs at the time consisted of two parts: (1) a demand charge to recover “a certain portion of a pipeline’s fixed costs” and paid each billing period (month) regardless of the level at which a customer purchases natural gas during

25. Natural Gas Policy Act, Pub. L. No. 95-621, 92 Stat. 3350 (codified at scattered sections of 15 U.S.C.).

26. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at scattered sections of 16 U.S.C.).

27. *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404-405 (1983).

28. Promoting Wholesale Competition, *supra* note 16, at 21,544.

29. *Id.* at 21,545.

that period, and (2) a commodity charge to recover "whatever fixed costs are not included in the demand charge" as well as the pipeline's variable costs.³⁰ "The commodity charge is levied on each unit of gas sold."³¹ A minimum commodity bill would require the customer "to pay the full commodity charge for a specified percentage of its contract entitlement [typically 75 percent to 90 percent], whether or not the customer actually takes gas at that percentage level."³² Although, at the time, two-thirds of all gas distribution utilities were served by only a single pipeline,³³ FERC was concerned that where customers *did* have a choice, the minimum commodity bill would "inhibit natural gas price decreases that could otherwise result from competitive forces."³⁴ FERC noted that its Order No. 380 required pipelines with minimum commodity bills to eliminate variable costs from their minimum bill charges.³⁵

ii. Special Marketing Programs

The same pressures that led FERC to reform minimum commodity bills also prompted it to launch a series of so-called special marketing programs. Under these programs, producers were allowed to sell gas already committed to a particular pipeline of another purchaser. The producers then credited the volume of the sale to the pipeline's high-priced purchase obligations. These programs increased the authority of an interstate pipeline to transport gas for end users, including those who utilized gas as a boiler fuel.³⁶ The competitive problems posed by these programs were two-fold. First, in the case of the purchase credit to the pipeline, the beneficiaries of the transportation option were only those whose purchases would not displace sales by the pipeline. The programs permitting users to take gas supply directly from producers only where they would otherwise use a different fuel in their boilers (typically electric utilities), also posed no risk to the pipeline. Both types of programs suffered from the vice that they were closed to truly captive customers (i.e., those wholly dependent on the pipeline for their gas supply). The affected, captive customers successfully challenged and overturned these programs through judicial review on the ground that they arbitrarily excluded other

30. Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, 49 Fed. Reg. 22,778, 22,779 (June 1, 1984) (codified at 18 C.F.R. pt. 154) [hereinafter Elimination of Variable Costs].

31. *Id.*

32. *Id.*

33. See *Pipeline Certificate Obligation*, *supra* note 19, at 222 n.27.

34. Elimination of Variable Costs, *supra* note 30 at 22,779.

35. *Id.*

36. *Order No. 636 Preambles*, *supra* note 21, at 30,444.

customers without consideration of the impacts on competition.³⁷ It was, in fact, the success of those customers in their legal battles that led FERC to issue its seminal decision in Order No. 436.³⁸

iii. Order No. 436

On October 9, 1985 FERC issued Order No. 436, which the D.C. Circuit described as “envisag[ing] a complete restructuring of the natural gas industry.”³⁹ Central to FERC’s order was its finding that pipelines, virtually without exception, made it their policy to refuse to transport their competitors’ gas supplies if the transportation would displace the pipelines’ own sales.⁴⁰ Invoking its power to remedy undue discrimination, FERC declared that a pipeline’s refusal to transport third-party gas supplies was unlawful and commanded the remedy of open access, a determination later upheld in court.⁴¹ As the Commission later described its achievement:

To achieve open-access transportation, Order No. 436 adopted three key regulations that are pertinent here. First, pipelines were required to permit their firm sales customers to convert their firm sales entitlements to a volumetrically equivalent amount of firm transportation service over a five-year period. Second, the pipelines were required to offer their open-access transportation services without discrimination or preference. Third, the pipelines were required to design maximum rates to ration capacity during peak periods and to maximize throughput for firm service during offpeak periods and for interruptible service during all periods. Order No. 436 thus provided the downstream gas purchasers with an alternative to buying gas from the pipelines in the distribution area under the pipelines’ bundled sales services.⁴²

iv. Order No. 636

FERC largely achieved the objectives of Order No. 436 and by 1992, pipeline transportation of competitors’ gas accounted for about 79 percent of total annual interstate pipeline through a reversal of the historic role of

37. See *Maryland People’s Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985); *Maryland People’s Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985).

38. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408, 42,409 (Oct. 18, 1985) (codified at CFR pts. 2, 157, 250, 284, 375, 381).

39. *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987). At the time, the Court predicted that the order “may well come to rank with the three great regulatory milestones of the industry: the passage of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982) (“NGA”) in 1938, the imposition of price controls on independent producers’ wellhead prices under *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 . . . and the Natural Gas Policy Act. . . .” *Id.*

40. *Associated Gas Distribs.*, 824 F.2d at 996.

41. *Id.* at 999.

42. *Order No. 636 Preambles*, *supra* note 21, at 30,396.

pipelines as principal suppliers to gas distribution utilities.⁴³ Most third-party gas continued to be transported on an interruptible basis, while gas pipelines sold gas under bundled firm sales tariffs.⁴⁴ FERC faced a two-fold problem. First, the interruptible transportation used to move the gas sold by pipeline competitors was, "by definition, inferior to the firm transportation included within the bundled, firm sales service."⁴⁵ Second, even where customers had access to firm gas transportation, FERC found that the quality of this transportation was also "inferior in quality to the firm transportation embedded within the pipelines' bundled, city-gate, firm sales service," because pipelines continued to have "access to essential facilities and services, such as storage, that are not generally available to shippers currently using firm transportation."⁴⁶

Order No. 636 was FERC's answer to this problem. The rule, among other things, issued blanket sales certificates to pipelines, allowing them to sell gas at market-based rates. It also required pipelines to provide higher-quality firm transportation service, unbundled storage services, and interruptible transportation services.⁴⁷ The heart of the rule was its requirement that pipelines "unbundle (i.e., separate) *their* sales services from their transportation services at an upstream point near the production area and to provide all transportation services on a basis that is equal in quality for all gas supplies whether purchased from the pipeline or from any other gas supplier."⁴⁸ Coupled with rules of conduct intended to prevent affiliate preferences,⁴⁹ FERC saw unbundling—requiring the pipeline and its affiliates to take transportation service under the same tariff as their competitors—as essential to the creation of "a regulatory environment in which no gas seller has a competitive advantage over another gas seller."⁵⁰ Pipelines continue to operate under the Order No. 636 regime.

43. *Id.* at 30,396-97.

44. *Id.* at 30,398.

45. *Id.*

46. *Id.*

47. *Id.* at 30,393-94.

48. *Id.* (emphasis added).

49. See *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, 53 Fed. Reg. 22,139, 22,139 (June 14, 1988) (codified at 18 C.F.R. pts. 161, 250, 284) [hereinafter *Order No. 497*].

50. *Order No. 636 Preambles*, *supra* note 21, at 30,393.

b. Electric Utilities

i. Market-Based Rate Authorizations

In the mid-1980s FERC first adopted policies approving the use of market-based rates for independent power producers and marketers lacking market power.⁵¹ Since they owned no means of transporting their power supplies to buyers, the success of these suppliers hinged on their ability to secure transmission from vertically integrated utilities.⁵² The leverage FERC exerted to open opportunities for these sellers lay in the fact that generating utilities and their affiliates who sought to sell power (outside of their traditional captive markets) wanted market-based rates because such authority allowed them to “move more quickly to take advantage of short-term or even long-term market opportunities than those laboring under traditional cost-of-service tariffs.”⁵³ Before granting these companies market-based rates, FERC required the utilities to show that they lacked market power or, if they possessed market power, to agree to mitigate it.⁵⁴ Mitigation typically involved the utility’s agreement to provide nondiscriminatory transmission service.⁵⁵

ii. Merger Conditions

As with filings for market-based rate authority, FERC used merger proceedings as the vehicles to pry open the transmission networks of the

51. “The first power marketer in the electric industry was Citizens Energy Corporation.” Promoting Wholesale Competition, *supra* note 16, at 21,545 n.42 (citing Citizens Energy Corporation, 35 F.E.R.C. ¶ 61,198 (1986)).

52. *Id.* at 21,545.

53. *Id.*

54. *Id.* at 21,545-46.

55. See Pub. Serv. Co. of Ind., Inc., 51 F.E.R.C. ¶ 61,367 (1990); Entergy Servs., Inc., 58 F.E.R.C. ¶ 61,234 (1992); Pub. Serv. Co. of Colo., 59 F.E.R.C. ¶ 61,311 (1992). A reasonable case can be made that FERC’s first tentative steps to open electric markets to competition began in the Carter Administration during the late 1970s. In 1978, FERC first adopted a per se rule striking down all resale restrictions contained in utility tariffs. See Gulf States Utils. Co., 43 Fed. Reg. 50,493 (Oct. 30, 1978). A year later, in *Florida Power & Light Company*, the Commission declared that the exercise of market power to restrict wholesale electric competition was presumptively unreasonable and adopted a “least competitively restrictive alternative” test. 8 F.E.R.C. ¶ 61,448 (1979). See also *Order No. 497*, *supra* note 49 at 35,658. That same year, in *Central Iowa Power Cooperative v. FERC*, the D.C. Circuit upheld a FERC order declaring that certain restrictions on power pool membership were anticompetitive and discriminated against smaller utilities. 606 F.2d 1156 (D.C. Cir. 1979). Its subsequent attempts to remove limitations on transmission service contained in several utility tariffs and to hold utilities to their representations about willingness to offer transmission were struck down. See *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981); *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388 (2nd Cir. 1980).

merging utilities. In the late 1980s and early 1990s "[t]he Commission also approved proposed mergers on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing 'open access' tariffs."⁵⁶ As with market-based rate applications,⁵⁷ FERC determined that absent mitigation of market power through such tariffs, the mergers would not satisfy statutory standards.

iii. FERC's "Golden Rule"

FERC's efforts to exert its leverage over market-based rate applications and merger applications as a means to ensure nondiscriminatory access to transmission networks had its obvious limitations. Specifically, they depended upon a continuous stream of willing applicants. In response to this problem, Congress passed the Energy Policy Act of 1992,⁵⁸ broadening FERC's authority to order transmission service. The problem FERC found with its new authority, however, was that it required case-by-case adjudication of individual complaints.⁵⁹ FERC's concern with "mounting competitive pressures in the industry" led it to conclude that the new statutory authority alone would not allow it to eradicate widespread discriminatory practices.⁶⁰

The problem FERC perceived was hardly unique to electric transmission. Both the FCC and other regulatory agencies have long recognized that the companies they regulate can exert market power through exaction of onerous terms, as well as through unreasonably high prices. Where the regulated entity competes with its customers, regulators have found it is essential to be vigilant about exclusionary practices. If one were simply talking about a regulated conduit, regulation of rate levels might well provide the basic consumer protection needed against abuse of market power. Where, however, the conduit owner is also in the business of providing competitive goods or services that utilize the conduit facilities,

56. Promoting Wholesale Competition, *supra* note 16, at 21,546. See also FERC Envtl. Action Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991); Utah Power & Light Co., 45 F.E.R.C. ¶ 61,095 (1988); N.E. Util. Serv. Co. v. FERC, 993 F.2d 937 (1st Cir. 1993); N.E. Utils. Serv. Co., 50 F.E.R.C. ¶ 61,266 (1990).

57. Unlike information services or first sales of natural gas, sales for resale of electricity remain subject to rate regulation. FERC, much like the FCC in its relaxed regulation of non-dominant common carriers, has determined that, so long as regulatory checks are in place to ensure that rates remain reasonable, it can approve market-based rates on a finding that the seller lacks market power. See, e.g., AEP Power Mktg. Inc., 107 F.E.R.C. ¶ 61,018 (2004) [hereinafter AEP].

58. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified at scattered sections of 42 U.S.C.).

59. Promoting Wholesale Competition, *supra* note 16, at 21,547.

60. *Id.*

terms and conditions take on added importance. The FCC's colocation rules are a prime example of agency regulation designed to limit the exercise of market power through the imposition of onerous terms and conditions of access.⁶¹ The colocation rules, for example, simply reflect the reality that Incumbent Local Exchange Carriers ("ILECs") not only have "last mile" market power, but utilize that "last mile" to provide Internet and other services in competition with other entities that are reliant on those same facilities. This phenomenon can be observed in other conduit or network industries, like oil and gas pipelines. They, too, have inherent incentives to favor their subsidiaries involved in the sale of oil and gas.⁶²

It was these concerns that led FERC to explore other means to ensure meaningful open access. "In the Spring of 1994, the Commission began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system."⁶³ In *American Electric Power Service Corporation*, FERC announced that it would "refocus our traditional analysis of undue discrimination" in cases involving transmission access.⁶⁴ Under what FERC would later that year describe as its "golden rule,"⁶⁵ transmitting utilities would be required to provide service on terms and conditions and at rates no less favorable than they provided to themselves or their affiliates for the carriage of power.⁶⁶ As the Commission later described its new policy:

The Commission further declared that comparable services must be provided through "open access" tariffs rather than only on a contract-by-contract basis:

(T)ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available * *

*. (In contrast), a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using

61. See *Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, Order on Reconsideration*, 15 F.C.C.R. 17,806, para. 50 (2000).

62. See *Promoting Wholesale Competition*, *supra* note 16, at 21,547. See, e.g., *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, 53 Fed. Reg. 22,139, 22,141 (June 14, 1988) (codified at 18 C.F.R. pts. 161, 250, 284). Similarly, electric utilities owning transmission facilities and left to their own devices, historically refused to provide access to those competing with them in the sale of power or offer to do so only on terms and conditions that were onerous.

63. *Promoting Wholesale Competition*, *supra* note 16, at 21,547.

64. 67 F.E.R.C. ¶ 61,168 at 61,490 (1994).

65. *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, FERC Stats. & Regs., Regs. Preambles Jan. 1991-June 1996, ¶ 31,005 at 31,141 (1994).

66. *Id.*

the transmission for their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG.⁶⁷

After *AEP*, FERC applied its new test in scores of cases,⁶⁸ ultimately concluding that it needed a new, industry-wide rule. The next step was taken in 1996, when FERC issued Order No. 888.⁶⁹

iv. Order No. 888

By 1996, when FERC issued Order No. 888, "106 of the approximately 166 public utilities that own, control, or operate transmission facilities used in interstate commerce ha[d] filed some form of wholesale open access tariff."⁷⁰ Citing its "statutory obligation under Sections 205 and 206 of the Federal Power Act ("FPA") to remedy undue discrimination,"⁷¹ FERC concluded that it needed to "eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others."⁷² The rule:

[r]equires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access nondiscriminatory transmission tariffs . . . [t]o take transmission service . . . for their own new wholesale sales and purchases of electric energy . . . under the open access tariffs . . . [t]o develop and maintain a same-time information system that will give existing and potential transmission users the same access to transmission information that the public utility enjoys, and further requires public utilities to separate

67. Promoting Wholesale Competition, *supra* note 16, at 21,548 (alterations in original) (quoting Southwest Reg'l Transmission Ass'n, 69 F.E.R.C. ¶ 61,100 at 61,397 (1994)). An RTG is defined "as a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional [and interregional basis]." *Id.* at 21,548 n.82 (quoting Policy Statement Regarding Regional Transmission Groups, 58 Fed. Reg. 41,626 (Aug. 5, 1993)). *AEP*, which was organized as a holding company comprised of various operating companies, was considered an RTG, as were other similar holding companies and members of various power pools (similar organizations of unaffiliated utilities). By announcing that it was extending its comparability mandate to all members of RTGs, FERC was able to extend the reach of its policy to numerous other utilities not covered by merger conditions or market-based sales tariff conditions. *Id.* at 21,548.

68. *See, e.g.*, *El Paso Electric Co. & Cent. S.W. Serv.*, 71 F.E.R.C. ¶ 65,001 at 65,026 (1995); *Florida Power & Light Co.*, 73 F.E.R.C. ¶ 63,018 at 63,135 (1995).

69. Promoting Wholesale Competition, *supra* note 16.

70. *Id.* at 21,541.

71. *Id.*

72. *Id.*

transmission from generation marketing functions and communications. . . .⁷³

The rule also “[c]larifies federal/state jurisdiction . . . and provides for deference to certain state recommendations; and [p]ermits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access.”⁷⁴

FERC also sought to encourage the formation of companies that would operate, but not own transmission systems, in the hope that such companies would further reduce the likelihood of discrimination. Its chosen vehicle was the Independent System Operator, or ISO. Although the Commission did not require the establishment of ISOs, it did provide guidance regarding ISO’s formation. ISOs would have no affiliation with any segment of the electric industry, but would operate regional transmission networks still under the ownership of vertically integrated utilities within the ISO region.⁷⁵ FERC cautioned, however, that if the functional unbundling it was ordering proved insufficient to ensure nondiscriminatory access, it would consider the adoption of an “operational unbundling” requirement, such as participation by transmission owners in an ISO.⁷⁶ In the meantime, FERC emphasized that functional unbundling would “work only if a strong code of conduct (including a requirement to separate employees involved in transmission functions from those involved in wholesale power merchant functions) [was] in place.”⁷⁷ To that end, FERC adopted a companion rule, Order No. 889, establishing guidelines to limit affiliate coordination or favoritism in the administration of open access tariffs.⁷⁸ Several years later, however, FERC concluded in Order No. 2000 that additional steps were necessary to ensure nondiscriminatory access. Unless more aggressive steps were taken to divorce transmission and power supply ownership, transmission providers would continue to favor the sale of their own energy products.⁷⁹

73. *Id.*

74. *Id.*

75. *Id.* at 21,593-94.

76. *Id.* at 21,552.

77. *Id.*

78. Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, *Order No. 889*, 61 Fed. Reg. 21,737 (May 10, 1996) (codified at 18 C.F.R. Pt. 37).

79. Regional Transmission Organizations, *Order No. 2000*, 65 Fed. Reg. 810, 823-24 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) [hereinafter *Order No. 2000*], *aff’d sub nom.* Pub. Util. Dist. No. 1 of Snohomish County v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

v. Order No. 2000

During the late spring of 1999, FERC launched a new rulemaking proceeding⁸⁰ that culminated, the next year, with the issuance of Order No. 2000.⁸¹ Order No. 2000 concerned the formation of Regional Transmission Organizations ("RTOs"), a slight variant on the ISOs it had encouraged in Order No. 888.⁸² The RTO Notice of Proposed Rulemaking ("NPRM"):

reviewed evidence that traditional management of the transmission grid by vertically integrated electric utilities was inadequate to support the efficient and reliable operation that is needed for the continued development of competitive electricity markets, and that continued discrimination in the provision of transmission services by vertically integrated utilities may also be impeding fully competitive electricity markets.⁸³

This evidence led FERC to conclude that it should take steps to encourage the development of "independent regionally operated transmissions grids"⁸⁴ or RTOs, to secure truly nondiscriminatory open access. Although the rule was to be voluntary (and was affirmed by the courts on that basis),⁸⁵ FERC articulated that its goal was, "for all transmission-owning entities in the Nation, including non-public utility entities, to place their transmission facilities under the control of appropriate RTOs."⁸⁶ While expecting that RTOs would form under its voluntary approach (including various incentives to transmission owners to turn over control of their facilities),⁸⁷ FERC nonetheless cautioned that if this did not prove to be the case, it would consider other measures.⁸⁸

80. Regional Transmission Organizations, *Notice of Proposed Rulemaking*, 64 Fed. Reg. 31,390 (June 10, 1999) (codified at 18 C.F.R. pt. 35).

81. *Order No. 2000*, *supra* note 79.

82. While there are several differences between RTOs and ISOs, they are not pertinent to this Article.

83. *Order No. 2000*, *supra* note 79 at 811. The change in industry structure has, by any measure, been dramatic. By the year 2000, all twenty-seven utilities had partially or completely divested themselves of ownership in generating facilities and assets, which represented 10 percent of all U.S. generating capacity. *Id.* at 813.

84. *Id.* at 811.

85. *See* Pub. Util. Dist. No. 1 of Snohomish County v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

86. *Order No. 2000*, *supra* note 79, at 811.

87. *Id.*

88. *Id.* A number of entities have since formed or proposed RTOs. *See, e.g.*, Southwest Power Pool, Inc., 106 F.E.R.C. ¶ 61,110 (2004). There has been push-back, however, from utilities and regulators in the Southeast and the Pacific Northwest concerned about the power crisis in California in 2000-2001 and opposed to FERC's 2002 proposed rulemaking to standardize the design of power supply markets. Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55,452 (Aug. 29, 2002). Press Release, Northwest Power Works, State Utility

What concerned FERC most about the functional unbundling required in Order No. 888, was that “functional unbundling does not change the incentives of vertically integrated utilities to use their transmission assets to favor their own generation, but instead attempt[s] to reduce the ability of utilities to act on those incentives.”⁸⁹ FERC went on to state that “instances of actual discrimination may be undetectable in a non-transparent market and, in any event, it is often hard to determine, on an after-the-fact basis, whether an action was motivated by an intent to favor affiliates or simply reflected the impartial application of operating or technical requirement[s].”⁹⁰ FERC concluded that separating the control of transmission from vertically integrated transmission owners, was the best way to ensure that competitors would have a fair shake.⁹¹

C. *The FCC’s Open Access Policies*

Because the Author assumes the reader has a greater familiarity with the history of FCC access regulation than federal regulation of the natural gas and electric power industries, this Article only briefly addresses the history of the seminal access decisions. The FCC’s *Cable Modem Declaratory Ruling*⁹² and the Ninth Circuit’s subsequent decision reversing the FCC⁹³ are given more extensive treatment because of their significance

Officials Release Statement Expressing Concern Over FERC’s Proposed Rules for Standard Market Design for Electricity (July 31, 2002), at <http://www.wpuda.org/nwpw/NWPWstateoffs.html>. See also *Standard Electricity Market Design, Full Committee Hearing Before the Senate Committee on Energy and Natural Resources*, 106th Cong. (2002) (statement of Marilyn Showalter, Chairwoman, Washington State Utilities and Transport Commission), available at http://energy.senate.gov/hearings/testimony.cfm?id=411&wit_id=951. This concern, however, is not so much about open access, but about whether FERC’s preference for divestiture of generation and its plans for monitoring the resulting power supply markets have left consumers vulnerable to the exercise of market power by generators entitled to charge market-based rates. In this respect, the issue is remarkably different from that framed by the FCC. In other words, the criticism of the electric industry is that there is too little regulation of downstream competition, not too much.

89. *Order No. 2000*, *supra* note 79, at 817.

90. *Id.* at 818.

91. *Id.* Even perceptions of unfairness, FERC found, could damage downstream competition:

[A]llegations of discrimination are serious because, if nothing else, they represent a perception by market participants that the market is not working fairly. If market participants perceive that other participants have an unfair advantage through their ownership or control of transmission facilities, it can inhibit their willingness to participate in the market, thus thwarting the development of robust competition.

Id.

92. *Cable Modem Declaratory Ruling*, *supra* note 1.

93. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). In the interest of full disclosure, the Author notes that he represented Brand X in its Ninth Circuit appeal.

for future regulation of both cable modem service and wireline broadband.

1. Carterfone

Much like the FPC's initial perception of its role, the FCC, for most of its early history, viewed telecommunications as "a natural monopoly that foreclosed competitive entry."⁹⁴ As one commentator noted, "competition was considered to be inefficient in the short run and not economically viable in the long, so the Commission did nothing to encourage it."⁹⁵ Prior to the FCC's seminal 1968 *Carterfone* decision⁹⁶ only AT&T equipment could be attached to AT&T's network. The decision, widely regarded as opening the door for the development of a competitive industry in consumer premises equipment,⁹⁷ allowed subscribers to attach equipment to the AT&T network as long as it was not publicly detrimental.⁹⁸ By the end of 1977, the FCC had developed rules establishing general standards for connection to the AT&T network. The decision was critical because it recognized that AT&T's transmission market power allowed it to exclude competition in the sale of telephone equipment, a market which was not naturally monopolistic. The FCC's current position is that requiring transmission providers to open their systems to competitors would discourage investment in infrastructure because they would not earn the profits from the sale of information services.⁹⁹ Interestingly, had the FCC taken its current position, it might well have concluded that opening the AT&T network to competing equipment suppliers would also discourage AT&T investment in its network.

94. Sherille Ismail, *Parity Rules: Mapping Regulatory Treatment of Similar Services*, 56 FED. COMM. L.J. 447, 451 (2004) (citing *Mackay Radio and Tel. Co., Inc.*, 2 F.C.C. 592 (1936)).

95. PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* 734 (2d ed. 1999).

96. Use of the Carterfone Device in Message Toll Tel. Serv., *Decision*, 13 F.C.C.2d 420 (1968).

97. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 285-314 (1982).

98. The "Carterfone" itself had been used for years without damaging the AT&T network. Tom Carter, the phone's inventor, began:

selling and installing two-way radios, primarily for the petroleum industry. While doing this, he discovered a real need for a device that would enable a well site (often off-shore) worker on radio to speak directly to executives via telephone in the corporate office, thereby eliminating the mistakes a radio relay operator might make. And so, he designed a coupler for radio communications that would attach to AT&T's network.

He sold these "Carterfones" for two decades before AT&T complained. PULSE ONLINE, TOM CARTER INDUCTED INTO RCR'S WIRELESS HALL OF FAME (Aug. 2001), at <http://pulse.tiaonline.org/article.cfm?id=546>.

99. See detailed discussion *infra* Section I.D.1.

2. MCI

The following year, in another decision widely credited with opening the long-distance telephone market to competition, the FCC granted MCI authority to construct a microwave system competing with the Bell System between Chicago and St. Louis.¹⁰⁰ The FCC broadened the scope of the decision two years later when it permitted entry of specialized common carriers in 1971.¹⁰¹

At about the time that the FCC was itself acting to open interstate telecommunications markets to competition by permitting resale and requiring nondiscriminatory access to other carriers, Congress was turning its attention to the same issues.¹⁰² In 1973 and 1974, the Senate Subcommittee on Antitrust and Monopoly held a series of hearings on the state of competition in the telephone industry.¹⁰³ Shortly thereafter, MCI had filed a successful antitrust suit against AT&T and the Bell System¹⁰⁴ and the Justice Department soon filed its own case that ultimately resulted in the breakup of the Bell System.¹⁰⁵ These decisions opened the door for competition in long distance service.

3. Computer I, II, and III

Just as technological tides had created opportunities for competition in the sale of customer-premises equipment and in the sale of long distance services, so too had advances in computer technology created new uses for the nation's telecommunications networks. The FCC began to explore the competitive ramifications of these advances in a series of rulemakings that started in the early 1970s.

a. *Computer I*

"In the initial *Computer Inquiry* decision . . . the FCC began wrestling with fundamental questions concerning the observed growing convergence

100. Application of Microwave Communications, Inc., *Decision*, 18 F.C.C.2d 953, para. 12 (1969).

101. Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Serv. in Domestic Pub. Point-to-Point Microwave Radio Serv., *First Report and Order*, 29 F.C.C.2d 870 (1971).

102. See Regulatory Policies Concerning Resale and Shared Use, *Report and Order*, 83 F.C.C.2d 167, paras. 18, 48 (1980).

103. *The Communications Industry: Hearing on The Industrial Reorganization Act S. 1167 Before the Senate Comm. on the Judiciary*, 93rd Cong. 497- 498 (1974) (statement of Kenneth A. Cox, Senior Vice President, MCI Communications Corp.).

104. MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983).

105. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, 460 U.S. 1001 (1983).

between the 'modern-day electronic computer' and 'communication common carrier facilities and services.'"¹⁰⁶ *Computer I*,¹⁰⁷ issued in 1971, was the FCC's first effort to address the difference between potentially competitive computing services and the telecommunications network on which the services depended. The order attempted to define distinctions between computers enabling communication from computers which merely performed data-processing services.¹⁰⁸ The distinction had significant regulatory consequences. Computer services *enabling* transmission were to be considered common carrier transmission services regulated under Title II of the 1934 Communications Act, while data-processing services that *used* the telephone network would not be considered regulated common carriers under Title II.¹⁰⁹

As FCC staff member Robert Cannon has noted, with the increasing development of computing technology and its dependence on the telephone networks, there was a growing "threat that the large telephone companies would use their economic might to subsidize data processing services and crush what the FCC found to be a thriving and competitive market."¹¹⁰ This threat led the FCC to rule "that large telephone companies could only offer data processing services through a separate subsidiary, preventing cross subsidization."¹¹¹ The FCC initiated what has come to be referred to as the *Computer II* proceedings in 1980 to avoid making case-by-case determinations of whether computerized communications hybrids fell under Title II or not.¹¹² The FCC's intent, as with *Computer I*, was to address concerns that "carriers would gain an unfair competitive edge by discriminating in favor of their own enhanced service offerings in

106. Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 597 (2004) (citing Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Servs. and Facilities, *Notice of Inquiry*, 7 F.C.C.2d 11, paras. 1-2 (1966)) [hereinafter *Horizontal Leap Forward*].

107. Regulatory and Policy Problems Presented by the Interdependence of Computer Use of Communications Facilities, *Final Decision and Order*, 28 F.C.C.2d 267 (1971) [hereinafter *Computer I*].

108. *Computer I* defined data processing as the "use of a computer for the processing of information as distinguished from circuit or message-switching." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 203 n.6 (D.C. Cir. 1982) (citations omitted).

109. *See id.* at 203.

110. Robert Cannon, *What Is the "Enhanced Service Provider" Status of Internet Service Providers?*, FCBA NEWS, Feb. 1997, at <http://www.cybertelecom.org/faqs/espart.htm>.

111. *Id.* *See also* *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990).

112. Cannon, *supra* note 110. *See also* discussion *infra* at Part I.C.3.b.

providing access.”¹¹³

b. Computer II

Computer II,¹¹⁴ like *Computer I*, modeled the FCC’s regulatory approach on a distinction between communications and data-processing services. It differed, however, in two fundamental respects. First, it adopted new “bright line”¹¹⁵ definitions of so-called “basic service”¹¹⁶—subject to common carrier regulation—and “enhanced service”—exempt from such regulation. Enhanced services were defined as:

[S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.¹¹⁷

Second, carriers, including the Bell Operating Companies (“BOC”), which used their own transmission facilities to deliver enhanced services to the public, were required to unbundle and sell their underlying transmission capacity to other enhanced service providers on a nondiscriminatory basis. More specifically, the FCC adopted “structural safeguards” requiring AT&T and its operating subsidiaries to provide enhanced services only through separate subsidiaries, but exempting other carriers from this separation requirement (but not from the unbundling requirement).¹¹⁸

c. Computer III

In anticipation of the January 1984 breakup of the Bell System

113. *California*, 905 F.2d at 1224.

114. Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980) [hereinafter *Computer II*].

115. *California*, 905 F.2d at 1224.

116. The FCC defined basic service as the offering of “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982).

117. 47 C.F.R. § 64.702(a) (2003).

118. *Computer & Communications Indus. Ass’n*, 693 F.2d at 207-209. “Although the FCC in *Computer II* continued to rely on structural separation as the principal means of preventing cross-subsidization and discriminatory access, it restricted the requirement to members of the Bell System and removed it from all other carriers. . . .” *California*, 905 F.2d at 1225. As the Ninth Circuit also noted in *California v. FCC*, while imposing structural separation requirements, the court did not apply them to AT&T and its subsidiaries “because those companies were thought to be barred from offering data processing services by a 1956 antitrust consent decree.” *Id.* at 1224.

resulting from a settlement of the Justice Department's 1974 antitrust suit,¹¹⁹ the FCC launched an inquiry "to determine whether and how the *Computer II* rules should be applied to the divested BOCs."¹²⁰ Over BOC objections, the FCC retained the structural separation requirements. The Seventh Circuit upheld the FCC's decision that the BOCs, even after divestiture, would retain local exchange monopolies and that "non-structural regulations. . . would be ineffective safeguards against anticompetitive behavior by the BOCs."¹²¹ *Computer III*,¹²² issued in 1986, retained the basic *Computer II* framework, but eschewed the strict structural safeguards it had adopted in the *BOC Separation Order* that had been issued only two years earlier. The FCC concluded that the separation requirement was no longer needed in light of the industry restructuring resulting from the AT&T divestiture.¹²³ Instead, the FCC ruled that it would be more cost effective to protect the BOC competitors through the (1) development of refined cost-allocation methods to minimize cost-shifting opportunities, and (2) adoption of specific regulations.¹²⁴ The regulations would create "an open-network policy of requiring the BOCs to make the telephone networks as accessible to competitors as they are to the BOCs themselves"¹²⁵—strikingly similar to FERC's own "golden rule" formulation nearly a decade later.¹²⁶

The Ninth Circuit rejected the FCC's argument, concluding that the

119. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

120. *California*, 905 F.2d at 1226.

121. *Id.* at 1227. See also *Enhanced Serv. and Cellular Comm. Servs. by the Bell Operating Cos., Report and Order*, 95 F.C.C.2d 1117 (1983).

122. Amendment of Sections 64.702 of the Comm'n's Rules and Regs. (Third Computer Inquiry), *Report and Order*, 104 F.C.C.2d 958 (1986), *on Recons.*, 2 F.C.C.R. 3035 (1987), Amendment to Third Computer Inquiry, *Report and Order*, 2 F.C.C.R. 3072 (1987), Amendment Computer III, *Memorandum Opinion and Order on Further Recons.*, 3 F.C.C.R. 1135 (1988), Amendment Computer III, *Memorandum Opinion and Order*, 3 F.C.C.R. 1150 (1988), Amendment Computer III, *Memorandum Opinion and Second Recons.*, 4 F.C.C.R. 5927 (1989), *rev'd California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), Computer III Remand Proceedings, *Report and Order*, 5 F.C.C.R. 7719 (1990), Computer III Remand Proceedings, BOC Safeguards, *Report and Order*, 6 F.C.C.R. 7571 (1991), *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), BOC Safeguards Order *vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), Implementation of Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 12,513 (1996), Computer III Further Remand Proceedings, *Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 6040, Computer III Further Remand Proceedings, *Report and Order*, 14 F.C.C.R. 4289 (1999), Computer III Further Remand Proceedings, *1998 Biennial Regulatory Review*, 14 F.C.C.R. 21,628 (1999) [hereinafter *Computer III*].

123. *California*, 905 F.2d at 1228-29.

124. *Id.*

125. *Id.* at 1229.

126. See *Am. Elec. Power Serv. Corp.*, 67 F.E.R.C. ¶ 61,168 (1994).

FCC had not adequately explained what changed circumstances would justify its about-face on structural separation.¹²⁷ Notwithstanding the FCC's abandonment of structural separation in *Computer III*, the common feature of the *Computer II* and *Computer III* decisions was the requirement that carriers that own "transmission facilities and provide enhanced" (now information) services must unbundle the transmission path and provide it to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations" (e.g., affiliated ISPs).¹²⁸

4. Leased Access Rules for Cable

There is, as discussed elsewhere in this Article, little statutory protection for consumers against cable market power in the delivery of video programming. For example, Congress unwisely chose to count on intermodal competition from satellite companies and over-the-air broadcast stations to discipline prices. What limited statutory protection that exists—like some control over basic cable service rates—has been weakened even further by the FCC's definition of the "effective competition" that triggers price deregulation over basic cable rates.¹²⁹ On the other hand, both Congress and the FCC have expressed concern about the protection of downstream competition between the cable companies and independent video programmers who are reliant on the cable platform. Finding evidence of cable company market power in video programming, Congress chose to impose obligations on cable companies to lease independent video programmers access to cable channels and directed the FCC to fashion regulations for administration of leased access.¹³⁰ Section 612 of the Communications Act¹³¹ establishes the terms of leased access to guarantee access to cable systems by third parties unaffiliated with the cable operators

127. *California*, 905 F.2d at 1231.

128. Independent Data Communications Mfr. Ass'n, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Serv. Is a Basic Serv., *Memorandum Opinion and Order*, 10 F.C.C.R. 13,717, paras. 13-14 (1995) [hereinafter *AT&T InterSpan Order*].

129. See *infra* text accompanying notes 252-58 (discussing the FCC's definition of effective competition).

130. *Media Ranch, Inc. v. Manhattan Cable TV, Inc.*, 757 F. Supp. 310, 313 (S.D.N.Y. 1991).

131. 47 U.S.C. § 521, 532 (2002). Section 612 was first enacted as part of the Cable Communications Policy Act of 1984 ("1984 Cable Act") and later amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (amended by Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)) (codified at scattered sections of 47 U.S.C.).

who want to distribute video programming¹³² free of the editorial control of the cable operator.¹³³

By its terms, Section 612 grants unaffiliated video programmers the right to secure channel capacity on a cable system. The cable system would be able to lease capacity in order to originate, produce, and provide independent video programming over which the video programmers, rather than the cable operator, maintained editorial control.¹³⁴ Congress set the number of leased access channels to be made available in proportion to the system's total activated-channel capacity to "assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."¹³⁵

The 1992 Cable Act amendments to Section 612 broadened the statutory purpose beyond specific protection of diversity of viewpoints to include the promotion of "competition in the delivery of diverse sources of video programming. . . ."¹³⁶ The legislative history of the 1992 amendments shows Congress's concern about the cable operators' willingness to exercise their market power to limit programming competition, especially where the cable company had a financial interest in the programming services it carried.¹³⁷ Under the 1992 Cable Act, cable operators must offer leased access at maximum rates and on terms and conditions that are "reasonable."¹³⁸ Refusals to provide leased access, or offers to do so that are made under unreasonable terms and conditions, are subject to redress before the Commission.¹³⁹ The 1992 Act also directed the

132. Video programming is "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20) (2002).

133. 47 U.S.C. § 532(b).

134. H.R. REP. NO. 98-934, at 48 (1984). This states in relevant part:

Cable operators clearly have an incentive to provide a diversity of program services However, cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system.

135. 47 U.S.C. § 532(a). Cable systems with thirty-six or more activated channels are required to comply with these set-aside requirements. § 532(b)(1).

136. § 532(a).

137. H.R. REP. NO. 102-628, at 3 (1992).

138. § 532(c)(4)(A).

139. § 532(e)(1). This section provides in relevant part:

Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available pursuant to this section may petition the Commission for relief under this subsection upon a showing of prior adjudicated violations of this section. Records of previous adjudications resulting in a court determination that

FCC to fashion implementing regulations: (1) to determine the maximum reasonable rates that a cable operator may establish for leased-access use, including the rate charged for the billing of subscribers and for the collection of revenue from subscribers by the cable operator for such use; (2) to establish reasonable terms and conditions for leased access, including those for billing and collection; and (3) to establish procedures for the expedited resolution of leased-access disputes.¹⁴⁰

Although independent video programmers do not have a large presence on cable systems, the FCC's implementing regulations, at least facially, provide for neutral treatment of cable operator and independent video programming, but without placing significant limits, other than a bar on discriminatory treatment, on the cable operator's pricing flexibility. Under Section 612 of the Act, a cable operator is entitled to reasonable compensation from those who lease its cable capacity.¹⁴¹ It bears emphasis that, as applied by the Commission, this standard does not provide the traditional cost-based compensation that a regulated utility would be allowed under a "just and reasonable" rate standard.¹⁴² Rather, cable companies will continue to enjoy the considerable pricing flexibility that has allowed them to raise overall rates with regularity and seeming impunity. Under the Commission's implicit pricing standard,¹⁴³ regulation of leased access rates simply assures the lessee that it will pay no more than a proportionate share of what the cable company implicitly charges itself. The pricing standard assumes "that a fair leased access rate should compensate the operator for the 'implicit fee' it would have earned had it not been required to lease the channel."¹⁴⁴ The ostensible purpose of this generous standard is to promote diversity without the creation of a financial

the operator has violated this section shall be considered as sufficient for the showing necessary under this subsection. *If the Commission finds that the channel capacity sought by such person has not been made available in accordance with this section, or that the price, terms, or conditions established by such system are unreasonable under subsection (c), the Commission shall, by rule or order, require such operator to make available such channel capacity under price, terms, and conditions consistent with subsection (c).*

Id. (emphasis added).

140. See Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992 Rate Regulation, *Report and Order*, 8 F.C.C.R. 5631 (1993). See also 47 C.F.R. §§ 76.701, 76.970, 76.971, 76.975 and 76.977 (2003) (providing rules governing commercial leased access).

141. *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1207 (D.C. Cir. 1998).

142. *Id.* at 1208.

143. 47 C.F.R. § 76.906 (2003).

144. *ValueVision*, 149 F.3d at 1207 (citing Implementation of Sections of Cable TV Consumer Protection & Competition Act of 1992, *Report and Order*, 8 F.C.C.R. 5631, 5949-50 (1993)).

burden on the cable operator.¹⁴⁵ In theory, under the implicit fee standard, the rate charged to the holder of leased capacity cannot be in excess of the implicit fee¹⁴⁶ charged to other channel users, including the cable operator itself. This concept—analogue to the framework that FERC has used to detect “price squeeze”¹⁴⁷—reflects the notion that a discriminatory rate cannot be reasonable.

The FCC’s leased access rules also focus on neutrality in a broader sense than the FERC’s price squeeze analysis. The FCC’s rules barring discrimination in terms and conditions of service¹⁴⁸ or access decisions based on programming content¹⁴⁹ do not allow a cable operator, for example, to base its lease charges, terms or access decisions (when capacity is insufficient to satisfy the requests of all comers) on the content of the video programming offered by the lessee. The requirement that similar rates be charged to similarly situated customers is a classic formulation of the traditional regulatory prohibition against undue discrimination.¹⁵⁰ Finally, cable operators must even offer entities requesting part-time leased access time slots “comparable” to those of both leased *and* non-leased programming.¹⁵¹ In analogous circumstances, the FERC has similarly held that, to ensure reasonable, nondiscriminatory access to their pipeline and transmission facilities, natural gas pipelines and electric utilities—even

145. *Id.* at 1209.

146. The implicit fee is calculated (in simplified terms) as total subscriber revenue per tier divided by the number of channels in the tier where the channel has been leased.

147. Price squeeze cases have generally involved claims by municipal utilities or rural electric cooperatives that their wholesale suppliers—who also operated adjacent distribution systems—were charging their wholesale customers more for power supply than they “charged” themselves, thereby giving the wholesale suppliers an unfair competitive advantage in the sale of power at retail. *See, e.g.*, *FPC v. Conway Corp.*, 426 U.S. 271, 274 (1976). Subsequent to the issuance of the *Conway* decision, FERC developed standards for establishment of a so-called prima facie price squeeze showing. *See* 18 C.F.R. § 2.17 (2004).

148. *See* 47 C.F.R. § 76.971(e) (2003) (prohibiting the imposition of access terms and conditions based on programming content and, with exceptions not pertinent here, prohibiting rate differentials based on programming content).

149. *See, e.g.*, 47 C.F.R. § 76.971(a)(3) (2003) (“On systems with insufficient available leased access capacity to satisfy current leased access demand, cable operators shall be permitted to select from among leased access programmers using objective, content-neutral criteria.”).

150. *See, e.g.*, *Alabama Elec. Coop. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982).

151. 47 C.F.R. § 76.971(a)(4) (2003). This Section provides in relevant part that:

Cable operators may accommodate part-time leased access requests by opening additional channels for part-time use or providing comparable time slots on channels currently carrying leased *or non-leased access programming*. The comparability of time slots shall be determined by objective factors such as day of the week, time of day, and audience share.

Id. (emphasis added).

though they are not common carriers—must offer their gas and electricity competitors access that is “comparable” to the access they provide themselves.¹⁵²

The FCC’s leased access rules, aside from broadband access policy, may have relevance for Internet-based applications over cable. In *Internet Ventures, Inc.*,¹⁵³ complainants, Internet Ventures (an ISP) and the Vermont Department of Public Service (the Vermont utility consumer advocate), both maintained that ISPs offered video programming and hence, were eligible for leased access under Section 612 of the statute. The FCC denied the complaint, ruling that ISPs offered an array of services while leased access under Section 612 was only available for video programming, but recognized that video programming might well be delivered over the Internet and that, if an entity were engaged solely in the provision of video programming that was Internet-based, a different question would have been presented.¹⁵⁴ The question of solely Internet-based video programming has still not been presented to the FCC, nor have there been changes in the existing leased access regulations.

D. *Role Reversal*

1. “Hands Off the Internet” Policy: Conflating Regulation of Information Services and the Broadband Platform

The FCC did not consider until 1998 the issue of “what, if any, regulatory treatment should be applied to cable modem service. . . .”¹⁵⁵ Even when presented with the issue, the FCC made a conscious decision to do nothing about cable modem service then, or in several subsequent proceedings, including a complaint case,¹⁵⁶ license transfer reviews in connection with mergers involving cable operators,¹⁵⁷ and a special report

152. See, e.g., Inquiry Concerning the Commission’s Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 59 Fed. Reg. 55,031, 55,034 (1994) (Nov. 3, 1994) (codified at 18 C.F.R. pt. 2) (“Comparability of transmission pricing involves a ‘golden rule of pricing’—a transmission owner should charge itself on the same or comparable basis that it charges others for the same service.”). “There is a similar ‘golden rule of access’—provide the same or comparable services to others as you provide yourself.” *Id.* at n.23. See also, Am. Elec. Power Serv. Co., 67 F.E.R.C. ¶ 61,168 (1994); Promoting Wholesale Competition, *supra* note 16.

153. Petition for Declaratory Ruling that Internet Serv. Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act, *Memorandum Opinion and Order*, 15 F.C.C.R. 3247 (2000) [hereinafter *Internet Ventures*].

154. *Id.* at para. 13.

155. *Cable Modem Declaratory Ruling*, *supra* note 1, para. 2.

156. *Internet Ventures*, *supra* note 153.

157. See Applications for Consent to the Transfer of Control of Licenses and Section 214

by the Commission's Cable Services Bureau.¹⁵⁸ The FCC even declined, after having elected to participate as amicus in the *City of Portland* case, to offer its views on the issue to the court.¹⁵⁹ The FCC's stated explanation was its desire to take a "hands-off" policy with respect to high-speed services provided by cable operators."¹⁶⁰ "Broadband services," it explained, "should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."¹⁶¹ In reaching this conclusion, the FCC relied on the declaration in the 1996 Act that it should endeavor to "preserve the vibrant and competitive free market that presently exists for the *Internet* and other interactive *computer* services, unfettered by Federal and State regulation."¹⁶² It also relied on the general directive in Section 706 of the Telecommunications Act to the FCC and to state commissions that they "encourage the deployment on a just and reasonable and timely basis of advanced telecommunications capability to all Americans."¹⁶³ In so stating, the FCC seems to have conflated

Authorizations by Time Warner Inc. and America Online, Inc., *Memorandum Opinion and Order*, 16 F.C.C.R. 6547, paras. 93-100 (2001) (barring discrimination against unaffiliated ISPs, including content, first screens, and service standards) [hereinafter *FCC AOL Time Warner Merger Order*]; American Online, Inc. & Time Warner, Inc., *Decision and Order*, Federal Trade Commission, Dkt No. C-3989, §§ II, III (Dec. 14, 2000), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf> (facilitating access, prohibiting interference, and barring discrimination for unaffiliated ISPs) [hereinafter *FTC AOL Time Warner Merger Order*]; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T, Corp., *Memorandum Opinion and Order*, 15 F.C.C.R. 9816, paras. 120-128 (2000) (noting AT&T commitment to provide unaffiliated ISPs with access to its cable systems, and the Department of Justice consent decree requiring AT&T to divest MediaOne's ownership of Road Runner and to seek DOJ approval before entering into certain types of agreements with Time Warner or AOL relating to the provision of high-speed Internet access services); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T, *Memorandum Opinion and Order*, 14 F.C.C.R. 3160, paras. 93-96 (1999) (no requirement imposed).

158. See Deborah A. Lathen, FCC Cable Services Bureau, *Broadband Today: A Staff Report on Industry Monitoring Sessions* (Oct. 1999); BARBARA ESBIN, FCC OFFICE OF PLANS AND POLICY, *INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST*, (Working Paper No. 30, 1998); KEVIN WERBACH, FCC OFFICE OF PLANS AND POLICY *DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY*, (Working Paper No. 29, 1997).

159. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 57.

160. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, 15 F.C.C.R. 19,287, para. 4 (2000) [hereinafter *Cable Modem NOI*].

161. *Wireline Broadband NPRM*, *supra* note 10, at para. 5.

162. *Id.* (citing 47 U.S.C. § 230(b)(2)) (emphasis added).

163. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 4 (quoting Telecommunications Act of 1996 § 706). The FCC's reliance on Section 706 seems particularly misplaced. As one pair of commentators has noted, Section 706 grants the FCC no independent authority. John Butler and Earl Comstock, *Access Denied: The FCC's*

Congressional desire to leave the competitive Internet and computer services largely unregulated with an assumed Congressional intent to deregulate what the FCC itself had found to be a highly *uncompetitive* market for broadband services.¹⁶⁴

Of course, the FCC's inaction on cable modem regulation was not, strictly speaking, a way to promote broadband deployment, even under the FCC's rationale. From the outset, it had regulated digital subscriber line ("DSL") access, another broadband platform, under the *Computer II* regime that it determined had been incorporated into the 1996 Act. Not surprisingly, the FCC's policy was widely criticized. The critics included both those seeking cable access and wireline DSL providers who complained that the playing field was not even. Its proposed solution, discussed *infra*, was simply to deregulate both DSL and cable modem service.¹⁶⁵ This was in keeping with its "hands-off" policy, but it marked a sharp reversal of decades of promoting nondiscriminatory access to networks. As Commissioner Robert Nelson of the Michigan Public Service Commission and Chairman of NARUC's Committee on Telecommunications put it:

The FCC is attempting to promote broadband deployment by minimizing the regulation of DSL and other Internet platforms. However, the agency's approach, which is based on an obvious misreading of the text of the Act is misguided as a matter of both the law and policy. While I am sympathetic to the overall policy goal of making it easier for providers to invest in innovative technologies and services, I have serious reservations regarding the FCC's creation of a whole new federal regulatory oversight system by reclassifying services – services that even the FCC, until recently, agreed were stand-alone common carrier services regulated under Title II of the Act – as "information services."¹⁶⁶

Failure to Implement Open Access to Cable as Required by the Communications Act, 8 CommLaw Conspectus 5, 9 (2000). Nor does Section 706 provide a basis for determining the FCC's jurisdiction. While it directs the Commission and state commissions to "encourage the deployment on a just and reasonable and timely basis of advanced telecommunications capability to all Americans," they are to use "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market or other *regulating* methods" to do so. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153 (emphasis added).

164. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, *Notice of Proposed Rulemaking*, 18 F.C.C.R. 6722, para. 113 (2003) [hereinafter *Multipoint Distribution Service Order*]. See also discussion *infra* at Part II.A.1.b.

165. See, e.g., *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 6.

166. *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something In Between?: Hearing Before the House Comm. on Energy and Commerce, Subcomm. on Telecommunications and the Internet*, 108th Cong. 16-17 (2003) (statement of Robert B. Nelson, Chairman, Nat. Ass'n of Regulatory Util. Comm'r,

By the FCC's account, three major initiatives related to its policy to encourage broadband deployment emerged: (1) the cable modem proceeding (which resulted in the Declaratory Ruling struck down in *Brand X*); (2) the Incumbent LEC Broadband Notice to examine "whether incumbent LECs that are dominant in the provision of traditional local exchange and exchange access service should also be considered dominant when they provide broadband telecommunications services";¹⁶⁷ and (3) the Triennial UNE Review Notice addressing "the incumbent LECs' wholesale obligations under Section 251 to make their facilities available as unbundled network elements to competitive LECs for the provision of broadband services."¹⁶⁸ Because two of these initiatives relate to intramodal competition between telecommunications carriers and because the focus of this Article is on the effects of FCC policy on *downstream* competition between broadband providers and their information service competitors (who may or may not be competing carriers), this Article focuses only on the *Cable Modem Declaratory Ruling* and the *Wireline Notice of Proposed Rulemaking*.¹⁶⁹

a. *Cable Modem NOI and Declaratory Ruling*

In the fall of 2000, the FCC released a Notice of Inquiry concerning the regulatory treatment of cable modem service.¹⁷⁰ This case had its origins in the cable "open access" debate, i.e., whether cable companies offering Internet service over their cable facilities should be required to provide competing ISPs with nondiscriminatory access to their systems. There are thousands of ISPs operating nationwide, most offering their services through traditional dial-up connections over telephone lines.¹⁷¹ With the development of commercially available cable modems in the mid-1990s, consumers also became able to access the Internet over cable lines

available at <http://energycommerce.house.gov/108/Hearings/07212003hearing1024/Nelson1603Print.htm> (last visited Feb. 28, 2005) [hereinafter Nelson Testimony].

167. *Wireline Broadband NPRM*, *supra* note 10, at para. 8.

168. *Id.* See also Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 22,745 (2001); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 22,781 (2001); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order*, 18 F.C.C.R. 16,978 (2003).

169. This truncation of the Article's discussion is not to downplay the importance of intramodal competition—its value is discussed at some length elsewhere in the Article and the FCC's Triennial Review Order has tremendous implications for vibrant competition among telecommunications carriers—but is simply a practical recognition of the limits of the Author's endurance.

170. *Cable Modem NOI*, *supra* note 160.

171. *Id.* at paras. 6-8.

at speeds many times faster than that possible with dial-up connections.¹⁷² Cable companies, almost without exception, were unwilling to offer competing ISPs access to their cable lines, claiming that full nondiscriminatory access was technologically infeasible or that it would discourage investment in broadband deployment or that it was beyond the FCC's authority to require.¹⁷³ As a result, they (or their affiliates) became near-exclusive providers of high-speed Internet service.¹⁷⁴ While that status changed somewhat with (1) the deployment by phone companies of DSL technology, and (2) limited-access arrangements prompted by the threat of government intervention by the Justice Department's Antitrust Division and the FTC, the FCC reported that DSL deployment had slowed. Specifically, it noted that, "[C]able's lead over DSL has grown; and several incumbent LECs and cable operators have raised their prices for high-speed Internet access services."¹⁷⁵

Even before the uptake in cable's already dominant position, these developments became causes for alarm for independent ISPs, several consumer groups, and a number of communities, all of whom viewed cable company dominance of high-speed Internet service as likely to limit consumer choice and to raise the price of Internet service.¹⁷⁶ A number of these parties, led by AOL,¹⁷⁷ formed the OpenNet Coalition to advance the cause of cable open access.¹⁷⁸ At about the same time, several communities, voicing similar concerns, sought to attach open access conditions to the transfer or merger of cable franchises in a number of cities.¹⁷⁹ One of these cities was Portland, Oregon, which required AT&T to offer cable modem service on a nondiscriminatory basis as a condition of its acquisition of the Portland cable system.¹⁸⁰

172. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 9 n.21.

173. *Id.* at paras. 5, 97; *See also* EchoStar Communications Corporation, Separate Statement of Comm'r Kathleen Q. Abernathy, CS Dkt. No. 01-348 (Oct. 9, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227263A3.doc.

174. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 9 (stating that they were actually the providers of approximately 68 percent).

175. *Id.* Since issuance of the *Cable Modem NOI*, DSL deployment has accelerated significantly, although cable systems continue to hold a commanding edge in broadband subscribers over DSL providers. *See* U.S. DEPT. OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 5, Sept. 2004, at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf> (last visited Feb. 28, 2005).

176. *See Cable Modem NOI*, *supra* note 160, at para. 12.

177. AOL "switched sides and suddenly became opposed to open access once it was acquired by Time Warner." Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 245, 258 (2002-2003).

178. *See Cable Modem NOI*, *supra* note 160, at para. 28.

179. *Id.* at para. 13.

180. *Id.*

AT&T challenged Portland's actions in federal district court, arguing that Portland exceeded its limited authority to regulate cable service under the Federal Communications Act. When the district court upheld Portland's position, AT&T appealed the decision to the Ninth Circuit. During this entire period, the FCC adopted what it later termed a "hands-off" approach to the open access issue¹⁸¹ and declined as amicus to offer its views on the scope of cable service to the court.¹⁸² Noting the FCC's silence, the Ninth Circuit proceeded to decide the question before it without the FCC's input.¹⁸³ The court agreed with AT&T that Portland had exceeded its limited authority to regulate cable franchises, but not for the reason AT&T had advocated.¹⁸⁴ Portland had no authority to impose an open access condition, not because such a condition would have exceeded its authority over cable services, but because cable modem service (the service used to provide broadband access to ISPs) was not a cable service at all, but rather included a telecommunications service subject to the common carriage requirements of Sections 201 and 202 of the Communications Act:

Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." A provider of telecommunication services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used."

* * *

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. *However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*¹⁸⁵

It would be up to the FCC, the court held, to determine whether to forebear

181. *Id.* at para. 4.

182. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

183. *Id.*

184. *Id.* at 880.

185. *Id.* at 877-78 (alteration in original, emphasis added, and citations omitted).

from regulating cable modem service under these provisions.¹⁸⁶

The court's decision prompted the Commission to examine its position. Citing the decision and two other decisions it declared to be in conflict with this court's ruling,¹⁸⁷ the FCC launched a Notice of Inquiry for the stated purpose of reexamining its so-called "hands-off" policy regarding the Internet.¹⁸⁸ That policy, it explained, was based "on the belief that 'multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers.'"¹⁸⁹ The FCC asked for comments on a number of questions, including whether cable modem service included a telecommunications service, as the court held, or whether it consisted of some other service, such as cable service, information service, or private carriage.¹⁹⁰ The FCC then asked whether, as a matter of public policy, a cable modem access requirement would retard deployment of broadband service, whether an open access requirement was technically feasible, and whether, assuming cable modem service was a telecommunications service, it could nonetheless forebear from regulating the service under Section 10 of the 1996 Act.¹⁹¹

The FCC elicited comments from hundreds of parties. ISPs, as well as public agencies such as the National Association of State Utility Consumer Advocates, the National Association of Towns and Townships, and the Consumer Federation of America,¹⁹² invoked the court's ruling that the transmission component of cable modem service was a telecommunications service subject to the common carrier provisions of the Communications Act. Several parties noted that even if cable operators did not offer the transmission component of cable modem service on a stand-alone basis, the FCC's decision in *Computer II* meant that they were required to do so since cable operators were offering it on an indiscriminate basis to the public using their own facilities.¹⁹³ One party noted that several cable companies were common carriers under the FCC's definition because they were already offering standard telephone service—a quintessential

186. *Id.* at 879.

187. *Cable Modem NOI*, *supra* note 160, at para. 2 n.3.

188. *Id.* at para. 4.

189. *Id.*

190. *Id.* at paras. 16-22.

191. *Id.* at paras. 44, 47, 48, 53-56.

192. *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Comments of the Competitive Access Coalition*, Dkt. No. 00-185 (Dec. 1, 2000), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159329 [hereinafter *CAC Comments*].

193. *See Cable Modem Declaratory Ruling*, *supra* note 1, at para. 42.

telecommunication service.¹⁹⁴ It is also observed that *Computer II* required any facilities-based carrier (in simple terms, carriers owning their own wires), including cable operators, to unbundle the underlying transmission capacity of their cable modem services and make it available to other information service providers.¹⁹⁵ In addition, the Competitive Access Coalition ("CAC") commented that forbearance could not be justified; cable companies dominated broadband deployment and their dominance required continued regulation to protect consumers and competition.¹⁹⁶ The limited competition available from telephone companies providing DSL access could not justify forbearance either, the commenters argued, since the provision of DSL service was itself subject to nondiscriminatory access requirements that the FCC had found it necessary to strengthen.¹⁹⁷ As to concerns about feasibility, these commenters submitted comments and affidavits detailing their position that nondiscriminatory access was indeed feasible and would not retard deployment or depress investment in broadband upgrades to cable systems.¹⁹⁸

For their part, the cable companies dismissed the court's *Portland* decision as erroneous¹⁹⁹ and maintained that cable modem service was one of the following: (1) a cable service exempt from common carriage requirements,²⁰⁰ (2) private carriage (also exempt),²⁰¹ (3) infeasible,²⁰² or (4) unnecessary.²⁰³ Alternatively, they argued that the FCC should forebear from regulating it.²⁰⁴

The FCC took no action on the comments for a considerable period.

194. Letter from John W. Butler, Earthlink Counsel with Sher & Blackwell, to Kenneth W. Ferree, Chief FCC Cable Services Bureau 6-8 (Nov. 8, 2001) (on file with the Author) [hereinafter Butler Letter].

195. *Id.* at 3-8.

196. *CAC Comments*, *supra* note 192, at 4-5.

197. *Id.* at 47-49.

198. See François Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, 24 TELECOMM. POL'Y 489 (2000) [hereinafter *Third-Generation Internet*]; Jeffrey K. MacKie-Mason, *Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle* (Nov. 5, 1999) at <http://www-personal.umich.edu/~jmm/papers/broadband.pdf> [hereinafter MacKie-Mason Report].

199. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Comments of the National Cable & Telecommunications Association*, Dkt. No. 00-185, at 10-11 (Dec. 1, 2000), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159666 [hereinafter *High-Speed Access Comments of NCTA*].

200. *Id.* at 2.

201. *Id.* at 14.

202. *See id.* at 69-81.

203. *See id.*

204. *See id.* at 39-67.

In the meantime, AOL completed its merger with Time Warner and, dispelling the technical feasibility argument, accepted a merger condition insisted upon by both the FTC and the FCC to address market power concerns. Specifically, the merged company would offer ISPs broadband access on a nondiscriminatory basis and would reach agreement to provide such service to at least three independent ISPs *before* it could offer AOL service, with compliance to be overseen by a special master.²⁰⁵

In March, 2002, the FCC finally took action on the *Cable Modem Notice of Inquiry*. It issued a two-part order. The first part consisted of the Declaratory Ruling that became the subject of the case before the Ninth Circuit.²⁰⁶ In the ruling, the FCC declared that cable modem service is an “information service” exempt from either the common carrier requirements of Title II of the Communications Act governing providers of telecommunications services or Title VI, governing the provision of cable services.²⁰⁷ It also purported to clarify that cable modem service was not only an information service, but an “*interstate* information service.”²⁰⁸ While cable modem service employed telecommunications facilities, the FCC held that “there [was] no separate telecommunications service offering to subscribers or ISPs.”²⁰⁹ In a remarkable display of regulatorychutzpah,²¹⁰ the FCC then cited its own decision not to provide the court with input as grounds for disregarding *Portland*. The Ninth Circuit’s contrary decision in *Portland* was “based on a record that was less than comprehensive,”²¹¹ and was decided without “the benefit of briefing by . . . the Commission” which, although participating as amicus curiae, “did not provide its expert opinion on this issue.”²¹² Thus, in three short paragraphs, the FCC concluded that the court’s decision could essentially be ignored:

56. *AT&T v. City of Portland*. We recognize that the United States Court of Appeals for the Ninth Circuit considered issues related to the classification of cable modem service in *AT&T v. City of Portland*. While we are considering the broad issue of the appropriate national framework for the regulation of cable modem service, the *Portland* court considered a much narrower issue—whether a local franchising authority, whose authority was limited to cable service, had the

205. See *FCC AOL Time Warner Merger Order*, *supra* note 157.

206. *Cable Modem Declaratory Ruling*, *supra* note 1.

207. *Id.* at paras. 7, 33, 59, 60, 68.

208. *Id.* (emphasis added).

209. *Id.*

210. The D.C. Circuit has defined “chutzpah” as follows: “[C]chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.” *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991).

211. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 58.

212. *Id.* at paras. 57-58.

authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access. In that case, the court held that the cable modem service at issue, @Home, was not a "cable service." The court further concluded that: "@Home consists of two elements: To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act."

57. The Ninth Circuit's decision was based on a record that was less than comprehensive. The parties proceeded on the assumption that the cable modem service at issue was a cable service and therefore did not brief the regulatory classification issue. Notably, the Commission, filing as *amicus curiae*, was not a party to the case and did not provide its expert opinion on this issue. In contrast, the record in this proceeding, developed over the course of a year through written comments and replies and meetings with interested parties, has fully addressed the classification issue and explored the characteristics of cable modem service as it is now provided.

58. The Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service. Nevertheless, in the passage quoted above the court concluded that because there is a "telecommunications" component involved in providing cable modem service, a separate "telecommunications service" is also being offered within the meaning of section 3(46) of the Act. As discussed in paragraph 40 above, however, under the Act telecommunications is distinct from telecommunications service. Though by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber. The Ninth Circuit did not have the benefit of briefing by the parties or the Commission on this issue and the developing law in this area.²¹³

As part of its Declaratory Ruling, the FCC also rejected the position

213. *Id.* at paras. 56-58 (citations omitted). The National Cable and Telecommunications Association made the similar claim, in its comments to the FCC, that the Ninth Circuit's holding in *City of Portland* was not binding. *High-Speed Access Comments of NCTA*, *supra* note 199, at 10. Although not itself directly claiming that the court's ruling was dicta, that is in effect what the FCC was saying. This argument was not seriously pursued on appeal, and for good reason. The court could not simply have held that cable modem service was not a cable service without explaining its decision. The *City of Portland* decision held that cable modem service was not a cable service *because* it was a telecommunications service. That is not dicta; it is the holding in the case. "[W]e *must* determine how the Communications Act defines @Home." *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (emphasis added). See also *GTE.net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141, 1147 (S.D. Cal. 2002) (rejecting dicta claim on same issue). Not surprisingly, the *Brand X* decision gave the claim short shrift. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1129 (9th Cir. 2003).

that *Computer II* required cable companies to offer a stand-alone cable modem service. “The Commission,” it held, “has never before applied *Computer II* to information services provided over cable facilities” and “[w]e decline to extend *Computer II* here.”²¹⁴ With respect to the argument that cable companies were common carriers because they were already using their wires to provide unbundled telecommunications services, the FCC incongruously responded that *Computer II*—which requires unbundling of telecommunications services—was only meant to apply to facilities-based telephone companies, not cable companies providing telephone services.²¹⁵ In any event, it held, even if it were wrong, it was going to waive *Computer II* requirements on its “own motion” because it did not want to “create an open access regime for cable Internet service applicable only to some operators.”²¹⁶

Finally, acknowledging that some arrangements between cable companies and third-party ISPs might involve the provision of an “‘input’ that is a stand-alone transmission service, making the ISP an end-user of ‘telecommunications’ as that term is defined in the Act,” it asserted that there was insufficient information in the record to determine the extent of such arrangements.²¹⁷ Citing AOL Time Warner’s assertion that it was negotiating access “on an individual basis,” the FCC concluded that if such arrangements existed, they would not constitute telecommunications services either, but “would be a private carrier service,” as would similar stand-alone telecommunications offerings by other cable companies made on “an individualized basis.”²¹⁸ The FCC did not explain how AOL Time Warner would be both an exempt private carrier, but still be subject to an FCC requirement “prohibiting specific kinds of discrimination against unaffiliated Internet service providers...their first screens, their content, and the quality of service afforded to them. . . .”²¹⁹

To summarize, the Declaratory Ruling held (1) that cable modem service was not, and did not include, a telecommunications service; (2) that if it was, it was not subject to *Computer II* unbundling requirements; or (3) that if those requirements applied, they were waived; (4) that if the transmission component of cable modem service was offered on a stand-alone basis, it was being offered on an individualized basis, and would

214. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 43.

215. *Id.* at para. 44.

216. *Id.* at para. 45.

217. *Id.* at para. 54.

218. *Id.* at para. 55.

219. *Id.* at para. 2 n.8 (referencing Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., *Memorandum Opinion and Order*, 16 F.C.C.R. 6547, paras. 93-100 (2001)).

therefore be exempt from the nondiscrimination provisions of Title II as private carriage; and (5) that as an information service, it was an interstate service. The second part of the FCC's order, its NPRM, offered one further tentative conclusion about future regulation of cable modem service. If it was wrong about the legal status of cable modem service, then it should forbear from any regulation at all. To make sure its approach to DSL access was on par, it should also forbear from regulating certain broadband services by telephone companies.²²⁰

In his dissenting opinion, Commissioner Copps described what he viewed as the result-oriented nature of the FCC's analysis:

The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements *were* to apply, they are waived, on the Commission's own motion, with neither notice nor comment. And if even that stretch somehow fails to get the point across, the *NPRM* adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the contrary. Even if cable modem services are found by the courts to be subject to regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply forbear from enforcing the rule. That's a far distance down the road from the simple NOI we are working from, isn't it?

Once the Ruling has reached its desired result to remove these services from regulatory requirements, we are then told not to worry – the Commission can build its own regulatory framework under its ancillary jurisdiction. Years ago, when I worked on Capitol Hill, we used to worry about legislation on an appropriations bill. Down here, I'm learning that I have to look out for legislation on an NPRM.

The NPRM adopted by the Commission today raises the further question – also addressed in a tentative conclusion in the *Wireline Broadband NPRM* – as to whether cable modem services should be subject to an access requirement. The majority notes that certain cable system operators have recently begun to enter into carriage agreements with unaffiliated ISPs. While this progress is worth noting, I would also note that such agreements are quite new, are generally limited to the largest cable systems, and are generally offered to only one or two unaffiliated ISPs. Thus, while there has been some promising movement in the direction of multiple ISP access, the progress has been slow and the course is far from set. The effect of this deliberate pace has been to deny many consumers access to more than one ISP – a circumstance that recently proved a near-disaster when the one ISP carried by some of the nation's largest cable systems abruptly closed

220. *Id.* at paras. 94-95.

its doors.²²¹

ISPs, whether they have access to cable facilities or only dial-up, compete to provide a number of functions for customers: content, e-mail, access to newsgroups, ability to create a personal web page, and access to the World Wide Web.²²² Those with access to the cable system, however, have a competitive advantage. As the FCC notes, the broadband connection allows subscribers the ability to “utilize more sophisticated ‘real-time’ applications,” to “view streaming video” and to make better use of private network Intranets.²²³ Soon after the FCC issued its Declaratory Ruling, Brand X, a California ISP, brought its Petition for Review to the Ninth Circuit. Similar petitions were filed in the District of Columbia Circuit by Earthlink, a national ISP, the Consumer Federation of America, and the California Public Utilities Commission but were transferred to the Ninth Circuit by lottery.

On October 6, 2003, a three-member panel issued its decision in *Brand X Internet Services v. Federal Communications Commission*,²²⁴ reversing the FCC. Citing to both Supreme Court and Ninth Circuit precedent holding *Chevron* inapplicable where, as in *City of Portland*, the court had already interpreted the statutory provision in question, the court in *Brand X* reversed the FCC’s contrary decision that cable modem service is solely an unregulated “information service” under the Act.²²⁵ It offered two grounds for its ruling.

The Supreme Court’s decision in *Neal v. United States*,²²⁶ the panel explained, holds that the *Chevron* deferential review does not apply where, as in the *Brand X* case, the Supreme Court or a circuit court has previously

221. *Id.* at 4871-72 (dissenting statement of Comm’r Michael J. Copps) (citations omitted).

222. *Id.* at para. 10.

223. *Id.*

224. 345 F.3d 1120, 1129 (9th Cir. 2003).

225. *Id.* at 1131-32.

226. 516 U.S. 284 (1996). The *Brand X* panel concluded that *Neal* applied not only to Supreme Court decisions, but to the decisions of lower courts as well:

Notwithstanding the Supreme Court’s use of the term ‘we,’ there is nothing to suggest that *Neal*’s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone.

Brand X, 345 F.3d at 1132. See also *United States v. Mead Corp.*, 533 U.S. 218, 248-249 (2001) (Scalia, J., dissenting). This portion of the dissenting opinion stated in relevant part:

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by any agency – or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.

interpreted the statutory provision in question. The panel concluded that *Neal*, therefore, "requires our adherence to the interpretation of the Communications Act we announced in *Portland*."²²⁷ The panel ruled that it was also bound by the Ninth Circuit's earlier decision in *City of Portland* under the longstanding Circuit rule announced by the court en banc in *Mesa Verde Construction Company v. Northern California District Council of Laborers*.²²⁸ The panel noted that, under *Mesa Verde*, Circuit precedent "may be disregarded in favor of the agency interpretation 'only where the precedent constituted deferential review of [agency] decisionmaking.'"²²⁹

Rehearing en banc was sought and denied, but on December 3, 2004, petitions for certiorari filed by the National Cable & Telecommunications Association and the Solicitor General were granted and are pending before the Supreme Court, where the cases will be argued in March 2005.²³⁰

b. Wireline Broadband NPRM

On February 15, 2002, the FCC issued its *Wireline Broadband NPRM*, what it termed the "functional equivalent to the *Cable Modem NOI*."²³¹ The FCC's stated objective was to adopt a "functional approach" to classification of broadband platforms, "focusing on the nature of the service provided to consumers, rather than one that focuses on the technical attributes of the underlying architecture."²³² In this regard, the FCC was true to its word: The NPRM proposes to treat broadband access to the Internet provided over domestic wireline facilities exactly like cable modem service. That is, if the wireline carrier bundles Internet access with transmission, the whole offering becomes an unregulated information service.²³³

The FCC's *Wireline Broadband NPRM* was, and technically still is, a *proposed rule*, although only weeks after its release, the FCC issued the *Cable Modem Declaratory Ruling*. The *Cable Modem Declaratory Ruling*

227. *Brand X*, 345 F.3d at 1132.

228. *Brand X*, 345 F.3d at 1130-31; *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc).

229. *Brand X*, 345 F.3d at 1130 (alteration in original) (quoting *Mesa Verde*, 861 F.2d 1124, 1136).

230. *Nat'l Cable and Telecomm. Assoc. v. Brand X Internet Servs.*, 125 S.Ct. 654 (2004).

231. *Wireline Broadband NPRM*, *supra* note 10, at para. 9.

232. *Id.* at para. 7. In promising a "functional approach," the FCC seems to endorse a key component of the "layers" concept discussed by Richard Whitt. See Whitt, *supra* note 106. But in the FCC's near-exclusive focus on providing incentives for deployment of broadband (irrespective of platform) to the exclusion of concerns about access, it seems disinclined to apply the layers concept in any meaningful way.

233. *Wireline Broadband NPRM*, *supra* note 10, at paras. 21, 24.

adopted the same statutory interpretation as the *Wireline Broadband NPRM*, leaving little doubt about where the FCC was headed. As the FCC noted in the *Wireline Broadband NPRM*, its actions have been driven by its “primary policy goal to encourage the ubiquitous availability of broadband”²³⁴ and its belief that, to achieve this end “broadband services should exist in a minimal regulatory environment.”²³⁵

The agency’s policy-driven focus is manifested in its explanations for the two broadband decisions. Although the *Declaratory Ruling* and the *Wireline Broadband NPRM* were issued only a month apart, they offered conflicting explanations for the same statutory conclusion. In the *Cable Modem Declaratory Ruling*, the FCC concluded that the regulatory classification of cable modem service was not governed by the *Computer II* framework incorporated into the 1996 Act because it only applied to telephone wires, not coaxial cable.²³⁶ In so doing, the FCC disregarded language in the Act making it clear that transmission service was transmission service “regardless of the facilities used.”²³⁷ In addition, the FCC claimed, the “telecommunications component” of cable modem service was “not . . . separable from the data-processing capabilities of the service,” but instead constituted one integrated information service.²³⁸ In the *Wireline Broadband NPRM*, by contrast, the FCC had to concede that it was not starting from scratch. Based on its own description of the *Computer II* and *Computer III* regulatory framework, the FCC stated, “the obligations deriving from [the *Computer II* and *Computer III*] proceedings currently apply to the provision of wireline broadband Internet access services by facilities-based telephone companies.”²³⁹ Since DSL is provided using telephone wires, the FCC could not claim, as it later would in the *Cable Modem Declaratory Ruling*, that the *Computer II* framework was inapplicable because it only applied to facilities-based telephone companies. Since the FCC had for years been requiring telephone companies to offer DSL unbundled from data processing, it could not very well argue that the two components formed an inseparable whole. Instead, it asserted that the *Computer II* framework of the 1996 Act was inapplicable to DSL because *Computer II* was only intended to apply to “narrowband data applications,” not broadband.²⁴⁰ As the FCC explained it

234. *Id.* at para. 3.

235. *Id.* at para. 5.

236. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 43.

237. 47 U.S.C. § 153(46) (2000).

238. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 39.

239. *Id.* at para. 44 (alteration in original) (citations omitted).

240. *Wireline Broadband NPRM*, *supra* note 10, at para. 36.

in the *Wireline Broadband NPRM*, there are now “very different legal, technological and market circumstances” than when it “initiated its *Computer Inquiry* line of cases.”²⁴¹ *Computer II* and *Computer III*, it stated, dealt with “traditional information services provided by facilities-based common carriers.”²⁴² In other words, the “core assumption underlying the *Computer Inquiries*” was that information providers would be providing “narrowband data applications.”²⁴³ By contrast, it added, new broadband technology “allows users to interact with media, with information and with each other in ways and at speeds that were scarcely considered when the *Computer Inquiry* was begun.”²⁴⁴ To the Author’s mind, this “different legal, technological and market circumstances” explanation is a hard sell since the FCC had already ruled in 1998 that the 1996 Act *did* apply the *Computer II* framework to broadband²⁴⁵ and had noted as much in the *NPRM* itself.²⁴⁶ While the FCC’s nuanced explanation of claimed changes in circumstances has a certain Talmudic-like quality, its analysis plainly lacks the rigor of the Talmudic scholar.²⁴⁷

241. *Id.* at para. 38.

242. *Id.* at para. 22 (emphasis added).

243. *Id.* at para. 36.

244. *Id.*

245. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1137 (9th Cir. 2003).

246. *Wireline Broadband NPRM*, *supra* note 10, at para. 44.

247. Just what different legal, technological, and market circumstances the FCC, in fact, had in mind are far from clear. As to legal changes, it seems implausible that the FCC could have intended the passage of the 1996 Act since, as noted above, the FCC had already construed the 1996 Act to apply to broadband DSL. In the *NRPM* itself, the FCC states that classification of information services under the 1996 Telecommunications Act is just an incorporation of the enhanced services concept adopted in *Computer II*. *Id.* at para. 18 n.38. Nor does the reference to technological changes make much sense either. The whole purpose of the *Computer* line of cases was to ensure that technological advances in enhanced services promised by robust competition among enhanced service providers would not be stifled by common carriers seeking to limit that competition. Finally, the market circumstance today, again by the FCC’s own account, is that the marketplace for broadband is highly concentrated—the very circumstance that, without unbundling, would impede technological innovation. If all the FCC means is that wirelines can now move data faster, this seems a rather contrived rationale driven by the FCC’s admitted bias towards minimal regulation of broadband.

Those looking for additional evidence of zeal in the FCC’s promotion of a minimum regulatory environment for broadband providers will surely find it in at least one of the questions the FCC poses in the *Wireline Broadband NPRM*. It asks, for example, whether even pure broadband service, i.e., “broadband transmission on a stand-alone basis, without a broadband Internet access,” could escape classification as a telecommunications service on the theory that wholesale sales of pure broadband transmission to information service providers, who then sell information services to consumers, might not be offered directly to the public for purposes of common carrier regulation under the Communications Act. *Id.* at para. 26. This hardly seems like the type of question an agency concerned about downstream competition would entertain seriously, much less ask on its own initiative.

Although issued several weeks before the *Cable Modem Declaratory Ruling*, no further action has been taken in the proceeding. It does not take speculation to conclude that the *Brand X* opinion rejecting the identical regulatory classification rationale proposed in the *Wireline Broadband NPRM* has put FCC action in this case on hold.

II. ANALYSIS

A. *Neither the Differing Natures of the Industries Regulated by FERC and the FCC nor the Regulatory Frameworks under which They Operate Explain Their Different Policy Approaches*

As the foregoing sections of this Article demonstrate, there is little difference between the rationale offered by the FCC and FERC for expanding third-party access to transmission and transportation networks, at least for the period prior to the FCC's abandonment of its historical commitment to open access. Experience in network industries has uniformly demonstrated that, without defined rules, open access systems that rely on voluntary negotiations are simply doomed to frustrate competition. Thus, oil pipelines are required to file tariffs, as are gas pipelines. The FERC imposes similar requirements on electric utilities. This Commission's co-location rules are a similar example of an effort to standardize the process so that less is left to negotiation. Where the agencies have diverged, it has been with respect to the *means* of promotion, rather than the *goal* of open access. In this regard, the FCC has tended to eschew structural formulations, concluding as it did in *Computer III* that the expense of structural separation might not be worth the cost, and that detailed rules to ensure the network owner's nondiscriminatory treatment of competitors are sufficient.²⁴⁸ By contrast, FERC's experience has led it to conclude that a model under which the fox guards the chicken coop—even if the fox is under strict orders to behave—simply will not work long-term. Thus, FERC has, in stages, concluded that functional separation, standards of conduct, and ultimately divestiture of control is needed to ensure truly nondiscriminatory access:

We believe that some of the identified standards of conduct violations are transitional issues resulting from a new way of doing business, and we acknowledge that many utilities are making good-faith efforts to

248. *California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990). The questions the FCC posed in its *Cable Modem NOI* evince a similar reluctance to explore more structural remedies. Positing a regulatory regime (which it later rejected in favor of deregulation of cable modem service), it suggested models under which the cable company or an ISP affiliate would administer and respond to requests for access by competing, independent ISPs. *Cable Modem NOI*, *supra* note 160, at paras. 30, 33, 35, 36, 43-46.

properly implement standards of conduct. However, we also believe that there is great potential for standards of conduct violations that will never even be reported or detected. Moreover, as we stated in the NOPR, we are increasingly concerned about the *extensive regulatory oversight and administrative burdens that have resulted from policing compliance with standards of conduct*. The use of standards of conduct is not the best way to correct vertical integration problems. Their use may be unnecessary in a better structured market where operational control and responsibility for the transmission system is structurally separated from the merchant generation function of owners of transmission.²⁴⁹

In other words, the independent operator approach reduces the need for regulatory oversight.

Given the FCC's past endorsement of open access policies, the question this Author poses is whether the stark differences between the FCC's current hands-off policy and FERC's aggressive regulatory agenda can be reasonably explained either by differences in the structures of the industries that the two agencies regulate, or in the statutory schemes that they administer. Those questions are explored below.

1. There Are Insufficient Differences in the Nature of Intermodal and Intramodal Competition between the Communications and Energy Industries to Explain the Different Approaches to the Issue of Open Network Access

The FCC's overarching rationale for its decision to deregulate broadband is its belief that access requirements will discourage the enormous investments needed by cable and exchange carriers to roll out broadband on a large scale. The FCC has reasoned that reasonable rates for broadband access will be ensured by encouraging robust intermodal competition between coaxial cable, DSL offered by exchange carriers, satellite services, fixed wireless, electric power line, and other technologies yet to be discovered.²⁵⁰ Additionally, the FCC believes that consumers are protected because companies operating these platforms have not yet limited customer access to any site on the Internet.²⁵¹

Although the FCC does not appear to have relied on it, intramodal competition (i.e., competition between cable companies, between DSL providers, or between satellite companies to serve the same geographic markets) would likewise put downward pressure on broadband access

249. Regional Transmission Organizations, *Order No. 2000*, FERC Stats. & Regs., Regs. Preambles July 1996-Dec. 2000 ¶ 31,089 at 31,016 (1999) (citations omitted and emphasis added) [hereinafter *Order No. 2000 Preambles*].

250. See *Wireline Broadband NPRM*, *supra* note 10, at para. 4.

251. *Cable Modem Declaratory Ruling*, *supra* note 1, at paras. 11 n.45, 87.

prices. Such competition does exist, but, as discussed *infra*, without much encouragement from the FCC.

Does the existence of intermodal and intramodal competition in the communications industry sufficiently distinguish it from the natural gas and electric industries so as to warrant its passive approach to access questions? The fair answer, this Author suggests, is a resounding no.

a. *The Limits of Intermodal Competition between Broadband Platforms as a Guarantor of Competition in Information Services*

In theory, the vertically integrated nature of a particular industry will not, in itself, harm consumers of the end product. For example, assume that all shoe manufacturing and retail sales were carried out by vertically integrated shoe suppliers. On its face, such an industry structure might suggest that the exclusion of independent manufacturers or retailers might limit consumer choice. If, however, there were 100 vertically integrated firms of equivalent size, most economists would agree that competition at both the manufacturing and the retail sales levels would be robust.²⁵²

To be sure, intermodal competition is a greater factor in the communications industry than it is in either the natural gas industry or the electric industry. Under at least some conditions, cable, DSL, satellite, fiber to the home, and even power lines are real broadband substitutes for one another. There is, by contrast, only one way to feasibly transport natural gas within the current system: via pipeline. There is no way to bounce natural gas off a satellite, and the considerable expense of liquefying and moving it by truck or ship is prohibitive. There are alternatives to electric transmission too—distributed generation,²⁵³ large-scale power plants, and conservation services are all potential substitutes for expansion of transmission capacity.²⁵⁴ These are real, but partial alternatives. They cannot replace *existing* transmission. This makes their disciplining force on transmission pricing important, but fairly limited.²⁵⁵

252. The shoe industry, in fact, has trended toward a vertically integrated, but not highly concentrated model. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 227 (1978).

253. See Harvey L. Reiter & Christopher Cook, *Rate Design, Yardstick Regulation, and Franchise Competition: An Integrated Approach to Improving the Efficiency of 21st Century Electric Distribution*, 12 *ELECTRICITY J.* 7, 94, 96 (Aug./Sept. 1999). See also Christopher Cook, *Competitive Distribution Services in a Restructured Electric Industry*, *POWERVALUE*, Jan.-Feb. 1998, at 27.

254. *Order No. 2000 Preambles*, *supra* note 243, at 31,123; Regional Transmission Organizations, FERC Stats. & Regs., Proposed Stats. & Regs. 1999-2003, ¶ 32,541 at 33,703 (1999).

255. See, e.g., *Northeast Util. Serv. Co.*, 58 F.E.R.C. ¶ 61,070 (1991).

The overriding problem with the FCC's reliance on intermodal competition is not that intermodal competition lacks viability, but that even as contrasted with the electric or natural gas industries, it is still nothing like the hypothetical shoe industry posited above. The market power of cable providers over high-speed access is in fact self-evident. In a competitive marketplace, sellers, except for reasons of creditworthiness or the like, do not ordinarily turn down customers when they have the inventory or capacity to serve them. There is no logical reason, other than a desire to suppress competition from unaffiliated ISPs or from Internet based video programmers—and an expectation that this course would be effective—for the cable operator to forego reasonable compensation for use of its capacity.²⁵⁶ The ability to make exclusionary practices stick is the essence of market power.²⁵⁷ Even ignoring the logical inferences to be drawn from the exclusionary policies of most cable companies, however, intermodal competition among broadband providers, *by any of the measures employed by either the FCC, FERC, or the nation's antitrust enforcement authorities*, is far too scarce to protect consumers. There is no shortage of commentators who have pointed this out,²⁵⁸ but one really need look no farther than the agency's own findings and statistics to reach a similar conclusion.

b. Broadband Delivery Markets, Like Gas Pipeline and Electric Transmission Networks, Are Highly Concentrated.

One industry group has recently recounted statements made to its representatives by the FCC Media Bureau to the effect that:

one reason why it might not be necessary to adopt a safeguard ensuring that consumers have unfettered access to Internet content, applications, and services and the right to attach all nonharmful devices to the network in the broadband era, is because the market for the delivery of broadband services is competitive.²⁵⁹

Electricity, however, cannot be delivered by truck or other means: the only mode of transportation is transmission lines. The only substitutes for transmission of electricity are local generation and demand side management. The Commission has found these options to be inadequate substitutes here, concluding that 'all of these alternatives have too long a development period and the prices at which they would become available are too uncertain for them to provide adequate price-discipline in short-term power markets.'

Id. at 61,192.

256. See, e.g., BORK, *supra* note 252, at 345.

257. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (stating monopoly power is the power "to raise prices or to exclude competition when it is desired to do so").

258. See Dibadj, *supra* note 177, at 272-276; Whitt, *supra* note 106, at 643; *Third-Generation Internet*, *supra* note 198; MacKie-Mason Report, *supra* note 198.

259. Ex Parte Submission from Gerald J. Waldron, Coalition of Broadband Users and

This view may explain the FCC's hostility to open access, but it is squarely at odds with the Commission's own fact findings. As recently as 2003, for example, the FCC found that "the typical broadband internet market is very highly concentrated."²⁶⁰ More specifically, the FCC found that the market for delivery of broadband services is, with only limited exceptions, confined to cable companies offering cable modem service and telephone companies offering DSL: "36% of high-speed lines are provided by a Regional [BOC] . . . or other [ILEC], 56% of high-speed lines are provided by cable (non-ILEC), and 7% are provided by other non-ILEC."²⁶¹ The FCC found even less competition for the patronage of residential consumers and small businesses:

As of June 30, 2002, national high-speed residential and small business lines consisted of 65% cable lines, 31% ADSL lines, and 3% other. . . . In addition, 31% of residential and small business high-speed lines are provided by a RBOC or other ILEC, 65% are provided by cable (non-ILEC), and 4% are provided by other non-ILEC on a national basis.²⁶²

Applying the Herfindahl-Hirschman Index ("HHI"),²⁶³ the measure for market concentration used by the Justice Department and the FTC, the FCC concluded that the broadband services market is extraordinarily concentrated:

If we assume that a typical residential (and small business) market consists of the ILEC provider, one cable provider, and one other non-ILEC, and assume that the national figures can be used to represent a typical local market, the HHI is approximately 5200. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, *the HHI ranges between approximately 5500 and 5800*. We note that the residential numbers indicate that the markets are more concentrated than the total numbers indicate.²⁶⁴

The FCC reasoned that such numbers lead to the conclusion that broadband Internet markets are usually quite "highly concentrated."²⁶⁵ The conclusion is certainly an understatement. On previous occasions the FCC has noted that "[u]nder the *DOJ/FTC Guidelines*, a market with a [HHI] . . . that

Innovators, to Marlene H. Dortch, Secretary, FCC 1 (Aug. 28, 2003), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514782581 [hereinafter Coalition Submission].

260. *Multipoint Distribution Service Order*, *supra* note 164, at para. 123.

261. Coalition Submission, *supra* note 259, at 2.

262. *Multipoint Distribution Service Order*, *supra* note 164, at para. 124.

263. See United States Department of Justice, *The Herfindahl-Hirschman Index*, at <http://www.usdoj.gov:80/atr/hhi.htm> (last visited Feb. 2, 2005).

264. *Multipoint Distribution Service Order*, *supra* note 163, at para. 124.

265. See *id.* at paras. 123-24.

exceeds 1800 is considered highly concentrated.”²⁶⁶ By the FCC’s own account, therefore, the *typical* local broadband market has a concentration level three times what the FCC already considers highly concentrated!²⁶⁷ Measures of typical local broadband markets, moreover, understate the problem because they ignore the fact that in some local markets there is no competition at all or, where it does exist, it is only available to some of the customers within the market.²⁶⁸ As Michigan Public Service Commissioner Robert Nelson has stated:

[The various broadband platforms] have different availability and performance characteristics, some of which are substitutes for others and some of which are not. Most consumers live in communities where they receive only one provider per technology platform and some consumers have no choice at all. The FCC’s approach may allow specific platform technologies, e.g., cable modem or ILEC DSL facilities, to maintain their dominance over specific facilities in specific geographic areas.²⁶⁹

This problem is likely to persist because, even in markets served by both cable and DSL, DSL’s technological limitations with respect to both bandwidth and distance are likely to keep it from being a substitute for a significant subset of the population.²⁷⁰ Moreover, critics of the FCC’s policy have pointed out that still nascent alternative technologies do not offer sufficient competition to discipline prices for cable or DSL

266. Application of EchoStar Communications Corp., *Hearing Designation Order*, 17 F.C.C.R. 20,559, para. 134 (2002) [hereinafter *EchoStar/DirecTV Order*].

267. See *Multipoint Distribution Service Order*, *supra* note 164, at paras. 123-24.

268. See *CAC Comments*, *supra* note 192, attachment 10, 7 (Affidavit of Nels Pearsall et al), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159611 and http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159612 (stating “of the areas in which high-speed data services are available, over 43% of those areas were served only by a single high-speed connection.”).

269. Nelson Testimony, *supra* note 165, at 19.

270. Even where alternate facilities are available, such as facilities to provide high-speed Internet access via DSL, customer choices are limited to at most one or two high-speed carriers in approximately 76 percent of the regional markets within the United States. See *CAC Comments*, *supra* note 192, attachment 10, 8 (Affidavit of Nels Pearsall et al), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159611 and http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159612. Under any reasonable definition of market power, companies operating in such a highly concentrated environment would *all*—DSL and cable companies alike—possess market power. Professor Dibadj makes the same observation: “[O]ne must bear in mind, that only 33% of homes have a choice between DSL and cable – 19% don’t have access to either, and 48% face a monopoly where there is only either cable or DSL.” Dibadj, *supra* note 177, at 273. Confronted with similar issues, FERC has concluded that an electric power supplier has market power where total market demand cannot be met without its capacity, even where it is not the sole supplier in a market. This pivotal supplier measure of market power recognizes that reliance on the existence of multiple suppliers in a market is inadequate to detect the existence of market power. See AEP, *supra* note 57.

broadband.²⁷¹ What is most confusing about the FCC's policy is that the agency itself has reached the same conclusion. With respect to broadband over satellite, for example, the FCC had this to say:

[Ka-band-based broadband Internet] services, however, are not only nascent, in nearly every case they are months, if not years, away from public availability. The facilities to provide broadband Internet access service using Ka-band spectrum are not yet deployed. Substantial uncertainties remain as to the likely quality and prices of such service.²⁷²

It reached a similar conclusion about other broadband platforms as well, finding that "[a]lthough MMDS, third generation wireless (3G) and other wireless technologies have the potential to significantly expand the availability of broadband Internet access to consumers in rural areas, they have yet to do so to any significant degree."²⁷³ In similar circumstances, the FCC has concluded that creation or protection of such duopolies is decidedly anticompetitive.²⁷⁴ Commentators are similarly pessimistic about

271. As Professor Dibadj points out:

DSL faces at least two technological constraints. First, the home must be within fifteen thousand feet of a central office switch for DSL to function, which limits its applicability to 80% of telephone subscribers; second, the bandwidth is inherently limited to approximately 1.5Mbps, which is unlikely to be enough for future cutting edge applications.

Dibadj, *supra* note 177, at 272-73 (citations omitted).

272. *EchoStar/DirectTV Order*, *supra* note 266, at para. 247.

273. *Id.* at para. 222. To be sure, the FCC has placed high hopes on yet another broadband platform—delivery over electric powerlines. *See, e.g.*, Inquiry Regarding Carrier Current Systems, Including Broadband over Power Line Systems, *Notice of Inquiry*, 18 F.C.C.R. 8498 (2003) [hereinafter *BPL Inquiry*]. As with other platforms, however, there are technological issues to overcome and widespread deployment is still likely years off. The Author suggests, in light of his experience with electric utility regulation, that many risk-averse utilities, burned in recent years by power marketing scandals, bankruptcies, and failed investments, will be cautious about jumping into broadband over powerlines.

274. In declining to approve the EchoStar/DirectTV merger, for example, the FCC concluded:

[F]or the vast majority of consumers, it would result in a reduction in the number of competitors from three to two or from two to one . . . Such drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption of significant anticompetitive effects.

EchoStar/DirectTV Order, *supra* note 266, at para. 99. In a separate statement, Chairman Powell expressed his concerns this way:

At best this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. . . . Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.

Statement, Michael K. Powell, Chairman, FCC (Oct. 10, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227263A2.doc.

the prospects for more than duopolistic competition.²⁷⁵

Finally, the FCC's approach to broadband regulation, it should be noted, is markedly different even from its own approach to the already limited regulation of cable rates and competition among satellite providers of video programming. For example, the notion that a single new competitor serving some limited segment of the same market as the incumbent would constitute viable competition, is inconsistent with the Commission's own application of the effective competition provisions of the 1996 Act. In the Implementation of Cable Act Reform Provisions of the 1996 Act,²⁷⁶ the Commission addressed the question of when a cable company would be subject to "effective competition" and hence exempt from rate regulation. More specifically, it addressed the application of the 1996 Act's Amendment to Section 623(1) of the 1992 Cable Act,²⁷⁷ governing competition from local exchange carriers (or their affiliates) offering video programming over LEC facilities. The Commission emphatically rejected arguments that cable companies would face "effective competition" from LECs if customers in *any* portion of their service area could choose LEC video programming.²⁷⁸ "[S]o lenient a test," it stated, "could have the unfortunate result of allowing a dominant cable company to raise rates, unabated by regulation or genuine competition, whenever an LEC delivers video signals to just one home in the franchise area."²⁷⁹ The FCC continued, stating that "Until [effective] competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage."²⁸⁰ For effective competition to exist, it concluded, "the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area."²⁸¹

275. See Dibadj, *supra* note 177, at 275-276.

276. Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, *Final Rule*, 64 Fed. Reg. 35,948 (July 2, 1999) (codified at 47 C.F.R. pt. 76) (corresponding to *Report and Order*, 14 F.C.C.R. 5296 (1999)).

277. 47 U.S.C. § 543(a)(1) (2000).

278. Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, *Report and Order*, 14 F.C.C.R. 5296, para. 9 (1999).

279. *Id.* (citations omitted).

280. *Id.* (citations omitted).

281. *Id.* at para. 10. In its Cable Modem NOI, the Commission seemed to have contemplated precisely the "lenient" test it condemned in video programming competition. There, the Commission posited two conditions under which open access might be mandated: (1) where the "cable operator is the only facilities-based provider of high-speed services and it owns or controls the ISP providing service to end users" and (2) where "there is an actual or potential competitor to the cable operator." *Cable Modem NOI*, *supra* note 160, at para. 42.

The Commission then posed a series of questions related to the second scenario, presumably because the answer to the first one is obvious—namely that if the cable operator

c. *Intramodal Competition between Broadband Providers Might Help, but It too Is Limited and Inadequately Encouraged*

The prior section of this Article discusses the dearth of meaningful intermodal competition between broadband platforms. Can the FCC's

has a complete monopoly on facilities-based provision of high-speed services, open access must be mandated. The basic question the Commission asked, therefore, was "Should the Commission intervene if there is *an* actual or potential competitor to the cable operator". *Id.* (emphasis added).

There is, it should also be mentioned, serious reason to question whether even the FCC's video programming "effective competition" test should be any kind of benchmark for effective or workable broadband competition. It is, in fact, hardly less lenient than the test it condemned. The FCC has defined "effective competition" to exist "when a single alternative cable supplier has the *right* (but not necessarily the desire) to serve at least half of a cable company's customers." Harvey L. Reiter & Stephen P. Chinn, *Municipal Entry into Telecommunications and Cable Services: Benefits and Barriers*, 44 MUNICIPAL LAWYER 14, 15 (2003). See also Dibadj, *supra* note 177, at 264 n.101.

Interestingly, at least one cable company affiliate has opposed an ILEC's forbearance petition on the grounds that the ILEC, in relying on a generic broadband market, had ignored the presence of multiple product and geographic markets in which the ILEC continued to possess substantial market power. See Petition of Qwest Corp. for Forebearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Comments of McLeodusa Telecommunications Services, Inc.*, CC Dkt. No. 04-223 (Aug. 24, 2004), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516382248. The definition of effective competition is silly enough, but consider this: the FCC has found effective competition to exist "in several cases based on the existence of satellite [DBS] providers, even though the FCC has incongruously found that 'the presence of effective competition due to DBS overbuild *has no significant effect on cable rates.*'" *Municipal Entry into Telecommunications*, *supra*, at 15 n.17 (quoting Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992, *Report on the Cable Industry Press*, 17 F.C.C.R. 6301, para. 45 (2002)) (emphasis added). Just what the FCC means by "effective" is anything but obvious. Cable rates, in fact, have continued to escalate at a pace significantly higher than the overall rate of inflation, and there is little reason to believe that "effective competition," as the FCC defines it, even where it exists, places any meaningful check on cable rates. See discussion *infra* at Section II.A.1.c.

To be fair to the FCC, its definition of effective competition aside, much of the increase in cable rates is attributable to legislative decisions to relax cable rate regulation. Dibadj, *supra* note 177, at 252-257. It bears emphasizing, however, that Congressional intent to relax cable rate regulation in reliance on intermodal competition is not equivalent to access deregulation. The analog to competition between information service providers reliant on broadband is not competition between cable, satellite, and over-the-air broadcasters, but competition between video programmers. Under the Cable Act, independent video programmers are still given the right to lease access to cable channels. 47 U.S.C. § 532 (2000). This right, as discussed in the following Section., is intended to protect competition between cable companies and video programmers reliant on them for access to cable service. The express language of the Act, for example, refers to a means to limit the anticompetitive conduct of cable companies who had hampered the entry of competing video programmers. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460 (1992). Cable rates to consumers are largely deregulated (under the fiction that intermodal competition will keep these rates reasonable), but video programmers are protected in theory by the assurance that they will not pay more for channel access than the cable companies implicitly charge themselves.

inaction on access issues be ascribed to reliance on effective intramodal competition? There can be little doubt about the potential effectiveness of intramodal competition. In many metropolitan areas around the country, gas distribution companies, for example, have long been connected to more than one interstate natural gas pipeline.²⁸² While interstate pipelines must receive certificates for authorization to provide transportation service, the certificates are nonexclusive.²⁸³ This fact notwithstanding, the rates, terms, and conditions of service provided by natural gas pipelines continue to be regulated under the Natural Gas Act.²⁸⁴ Indeed, it is the limited competition that multiple pipelines provide to one another that provides "incentives for innovation by the regulated companies themselves" and allows the agency to "more easily act to universalize these benefits than it could have acted to extract them initially."²⁸⁵ The Supreme Court has noted that "the competition from a single potential entrant to the market," for example, prompted the existing pipeline to drop its rates by 25 percent.²⁸⁶

The history of electric power regulation is similar. A single electric utility typically provides distribution of electric power to end-users in a given franchise area. And although, by state law, utility franchises are typically nonexclusive²⁸⁷ and utilities face potential competition from municipalities that have the power of eminent domain,²⁸⁸ the rates, terms, and conditions of distribution service continue to be regulated. Until early in the last century, the predominant means of consumer protection in the electric industry was the threat that an existing utility would be displaced when its franchise expired, or if the municipality in which it was located exercised the power of eminent domain.²⁸⁹ Despite the usefulness of competition and the need to nurture franchise competition, states ultimately concluded that electric distribution possessed natural monopoly characteristics, thus necessitating regulation.²⁹⁰

282. *Lynchburg Gas Co. v. FPC*, 336 F.2d 942, 949-950 (D.C. Cir. 1964) (Washington, J., concurring).

283. *Panhandle E. Pipe Line Co. v. FPC*, 169 F.2d 881, 884 (D.C. Cir. 1948).

284. 15 U.S.C. § 717 (2000).

285. *N. Natural Gas Co. v. FPC*, 399 F.2d 953, 965 (D.C. Cir. 1968).

286. *Id.* at 966 (referencing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 654-665 (1964)).

287. *See Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939).

288. *Puget Sound Power & Light Co. v. City of Seattle*, 291 U.S. 619, 626 (1934).

289. Peter Fox-Penner, *ELECTRIC UTILITY RESTRUCTURING: A GUIDE TO THE COMPETITIVE ERA* 95 (1997) (stating that "the awarding of franchises, often for short periods or non-exclusively to promote competition, was the primary means of controlling the industry").

290. BREYER, *supra* note 97, at 15-16; *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984).

Vertically integrated electric transmission providers also face competition in some markets from what have been termed “merchant transmission companies,” companies engaged exclusively in the provision of transmission service.²⁹¹ While FERC has encouraged the formation of such companies and shown flexibility in their regulation, it has not exempted existing transmission providers from its open access requirements on the basis of the existence of this limited form of competition.

There is also intramodal competition in the cable and telecommunications industries and it is effective where such competition exists. Such competition is limited, however, and it is neither vigilantly protected nor promoted.

Consider the cable industry. Cable rates for what are termed “premium services” —movie channels, pay-per-view programming and the like—are completely unregulated²⁹² and have been rising at three times the rate of inflation since 1996.²⁹³ While local governments retain the authority to regulate rates for so-called “basic tier services”—local television stations, public television, and community access channels—this regulatory power is quite limited. Under the provisions of the 1996 Act, localities lose this power once cable companies can demonstrate the existence of effective competition,²⁹⁴ a loose standard, as discussed previously. The limited effective competition that does exist is itself becoming scarcer with “cable consolidation moving into an even higher gear.”²⁹⁵ Even before the FCC’s approval of the AT&T-Comcast mega-combination,²⁹⁶ the top ten

291. In the United States and Canada, the first project is the Cross Sound Cable linking Connecticut to Long Island, New York, approved by the FERC. *TransEnergie U.S. Ltd.*, 91 F.E.R.C. ¶ 61,230 (2000) (forecasting construction to be completed in summer 2002, commercial operation expected to begin in 2003). The second project is the Lake Erie Link, which will connect Ontario with Ohio and/or Pennsylvania, filed by TEUS and its partner, Hydro One Delivery Services, and was approved by FERC. *TransEnergie U.S. Ltd. and Hydro One Delivery Services Inc.*, 98 F.E.R.C. ¶ 61,147 (2002). The third project was the Harbor Cable, which will link the New Jersey and New York City markets, was also approved by FERC. *TransEnergie U.S. Ltd.*, 98 F.E.R.C. ¶ 61,144 (2002).

292. See 47 U.S.C. § 543(c)(4) (2000).

293. Press Release, John McCain, United States Senator, McCain Requests GAO Review of Soaring Cable Rates (Apr. 16, 2002), at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=265.

294. 47 U.S.C. § 543(l).

295. Bruce Orwall et al., *Why the Possible Sale of AT&T Broadband Spooks ‘Content’ Firms*, WALL ST. J., Aug. 27, 2001, at A1.

296. News Release, Federal Communications Commission, FCC Grants Conditioned Approval of AT&T-Comcast Merger (Nov. 13, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228446A1.pdf.

companies were controlling about 90 percent of the market.²⁹⁷ The high concentration in the cable industry resulting from consolidation, coupled with the substantial stakes the remaining cable operators have in programming networks, create barriers to entry for overbuilders.²⁹⁸ The FCC has noted that the "vast resources" of these mega-companies create major obstacles for a "single system entrant."²⁹⁹ The FCC found this despite the fact that cable rates for single system operators are, on average, an astounding 23 percent lower than for their major industry counterparts.³⁰⁰

The intramodal rivalry that cable companies face stems from two sources, (1) private "overbuilders," i.e., companies that build duplicate cable networks to serve all or part of a given community and (2) municipalities. The latter might also overbuild or, alternatively, use their powers of eminent domain to condemn cable properties and take over their operation. Intramodal competition has a marked effect on cable rates. When municipal utilities start or seriously consider providing cable services, the price and quality of service by the existing utilities improve significantly.³⁰¹ A 1999 news article reported that rate increases were the smallest in southeastern Michigan service territories served by more than one cable operator.³⁰² Additionally, the rates of the Detroit area's lone municipally-owned cable system—run by the City of Wyandotte—were the lowest of all the Detroit cable operators.³⁰³ Nationwide, according to the FCC, when cable companies faced some competition they charged rates 6 percent less than when there was no competition.³⁰⁴ When there was a municipal competitor involved, rates were 22 percent lower.³⁰⁵

If intramodal competition has such a salutary effect on cable service and rates, what has the FCC done to encourage it? If would-be competitors

297. John Kelly, *Old Snake Oil in New Bottles: Ideological Attacks on Local Public Enterprises in the Telecommunications Industry* (Oct. 2001) (on file with Author).

298. See Dibadj, *supra* note 177, at 270-271, 276-278.

299. *Id.* at 278 (citations omitted).

300. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, *Statistical Report on Rates for Average Service, Cable Programming Service, and Equipment*, 17 F.C.C.R. 6301, para. 28 (2002) [hereinafter *Statistical Report*].

301. David Armstrong & Dennis K. Berman, *Fighting City Hall, Telecom Companies Confront New Rival: The Municipal Network*, WALL ST. J., Aug. 17, 2001, at A1.

302. Kirk Speer, *Cable Bills Soar 10% in 2 Years: Metro Detroiters with a Choice of Companies Have Smaller Increases*, *News Survey Shows*, DETROIT NEWS, Feb. 16, 1999, at A1.

303. *Id.*

304. *Statistical Report*, *supra* note 300, at para. 6 n.12.

305. See Dibadj *supra* note 177, at 264 n.103.

and local regulators are to be believed, the FCC has not done much more than issue reports. A recent complaint filed by the National Association of Telecommunications Officers and Administrators ("NATOA") charges that cable companies have engaged in a broad range of anticompetitive tactics.³⁰⁶ Specifically, these tactics are said to "include predatory pricing, targeted rate discrimination, denial of access to content, denial of access to customers, refusal to deal with contractors and suppliers, destruction of property, and an assortment of other unfair practices."³⁰⁷ While action on these complaints might encourage some additional entry, the bigger problem, as Professor Dibadj observes, is that the indifference of the FCC and antitrust authorities to merger impacts let cable giants emerge in the first place, not that cable giants might misbehave.³⁰⁸ The size, resources, and political clout of the relatively few remaining cable companies now create nearly insurmountable barriers to new entry.³⁰⁹

ILECs also face potential competition from other DSL providers and municipalities.³¹⁰ As with intramodal cable competition, however, there is very little intramodal competition for ILECs, and it has not been encouraged or protected. DSL allows customers to use their telephone lines for high-speed data transmission. As the *New York Times* has noted, however, four regional phone companies dominate DSL service.³¹¹ Business and residential consumers, it notes, "complain that [DSL] remains too costly and too difficult to obtain," and worry that there is too little competition.³¹² Many CLECs also complain that they have faced considerable obstacles in trying to compete with the ILECs to offer DSL services.³¹³

306. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Comments of National Association of Telecommunications Officers and Advisors*, MB Dkt. No. 04-227 (2004), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516285333.

307. *Id.* at 2.

308. Dibadj, *supra* note 177, at 265-272. As the number of franchises shrinks, there is also less basis for meaningful yardstick comparisons of their performance by regulators and consumers. See also Harvey Reiter, *Implications of Mergers and Acquisitions in Gas and Electric Markets: The Role of Yardstick Competition in Merger Analysis*, 20 Nat'l Regulatory Research Inst. Quarterly Bulletin, 193 (1999) (discussing yardstick competition impacts resulting from mergers of regulated utilities).

309. See Dibadj, *supra* note 177, at 276-278.

310. See Chinn and Reiter, *supra* note 281.

311. Katie Hafner, *Digitally Disenfranchised: Bell Companies are Banned for the Slow Start of a Fast Internet Service*, N.Y. TIMES, Aug. 6, 2001, at C1.

312. *Id.*

313. Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, *Reply Comments of Teletruth*, GN Dkt. No. 04-54 (2004) (on file with The Federal Communications Law Journal). There are

While intramodal competition among DSL providers surely should be encouraged, it should be seen as a supplement to, not a substitute for regulation. Even being wildly optimistic, it is hard to envision a fully competitive market for the provision of DSL. Nearly forty years ago, the District of Columbia Circuit characterized the gas pipeline industry to be a "tight oligopoly," but aptly observed that "regulation is as necessary for consumers in these markets as in monopoly markets."³¹⁴ At the same time, the court observed, "competition and direct regulation would complement each other to the benefit of consumers generally."³¹⁵ The FCC would do well to take this observation to heart.

d. Do Industry Differences between the Communications and Energy Industries Diminish the Importance of Downstream Competition?

As discussed in prior sections of this Article, delivery networks in the communications, electric, and natural gas industries are all marked by high levels of concentration. Can differences in the nature of downstream competition in these industries nonetheless justify a different approach to access issues? In other words, is nondiscriminatory access to broadband delivery platforms of less importance to competition among information service providers than pipeline or electric transmission access is to sellers of natural gas or electricity?

In response to concerns by consumers and independent ISPs that closed delivery systems will stifle competition among information service providers,³¹⁶ cable companies have stated that no cable company has proposed to deny consumers access to any source of information available on the Internet.³¹⁷ The FCC appears to have accepted this notion, stating

many who have also argued that the FCC's recent Triennial Review Order, and in particular its end-to-line sharing, may spell the death knell for such competition. *See, e.g., id.*

314. *N. Natural Gas Co. v. FPC*, 399 F.2d 953, 965 (1968).

315. *Id.* at 966.

316. The Small Business Administration, too, has voiced concern that a closed-access system "will severely hamper the ability of small ISPs to provide broadband service," and "will create impenetrable barriers to entry, eliminating competition from small businesses and removing consumer choice." Letter from Thomas M. Sullivan et al., Small Business Administration, Office of Advocacy to FCC, to Chairman Michael K. Powell (Aug. 27, 2002), at http://sba.gov/advo/laws/comments/fcc02_0827.html (last visited Feb. 4, 2005) [hereinafter SBA Comments].

317. *See High-Speed Access Comments of NCTA*, *supra* note 199, at 55. These comments, curiously enough, were invited by a question posed by the FCC in its Cable Modem NOI. There, the Commission asked whether there would be any competitive harm from the denial of open access "if ISPs seeking access to the cable modem platform offer services that are not different from or more attractive to consumers than those provided by the affiliated ISP." *Cable Modem NOI*, *supra* note 160, at para. 42. That the FCC even

that it would take measures to ensure that consumers retained such access.³¹⁸ Even if it were true that concentration among information service providers posed no threat to the free flow of information and ideas on the Internet—a dubious proposition given the technology available to steer consumers to sites or to content favored by the broadband provider and the incentive to use that technology³¹⁹—this alone does not justify the differences in the access policies of the FCC and FERC.

The notion that if customers have full access to the Internet they need not worry about limitations on their choice of ISPs fails on two fundamental grounds. First, it wrongly assumes that ISPs are completely fungible. Second, it makes the erroneous assumption that fungibility in downstream service renders competition among information service providers irrelevant.

Information service providers are not fungible (i.e., they do not all

posed this question is highly unusual. It suggests that reliance on the benevolent monopolist would be sufficient to protect consumers' interests in receipt of high quality, reasonably priced Internet service. That question, this Author submits, should never have been relevant after *Carterfone*. On the contrary, the logical regulatory presumption should have been that Internet services, like customer premises equipment, should be available from competitors of the transmission provider.

318. *Wireline Broadband NPRM*, *supra* note 10.

319. Numerous companies advertise caching technology that allows Internet providers to limit and control content. *See, e.g.*, Inc.com Business Services, at http://www.inc.com/find/directory.jsp?path=/directory/internet_and_online/site_management/caching&partner=inc (last visited Feb. 4, 2005). *See also* Blue Coat, *Controlling Web Users and Content Through Scalable URL Filtering*, White Paper (2003), at http://www.bluecoat.com/downloads/whitepapers/BCS_content_filtering_control.pdf (last visited Feb. 4, 2005).

The problem of content steering has been discussed widely in the literature and in comments filed with the FCC. As Tufts University Professor Shawn O'Donnell put it:

Consumers are, on average, poorly equipped to challenge the service they get from their communications providers. It is difficult and costly for consumers to aggregate their modest interests. Cable operators and their content affiliates, on the other hand, have very high incentives to cooperate, and their small number simplifies negotiations.

Moreover, differential caching or routing need not be blatant to be effective in steering consumers to preferred content. The subtle manipulation of the technical performance of the network can condition users to unconsciously avoid certain 'slower' web sites. A few extra milliseconds delay strategically inserted here and there, for example, can effectively steer users from one website to another.

Shawn O'Donnell, *Broadband Architectures, ISP Business Plans, and Open Access*, Presentation at 28th Telecommunications Policy Research Conference 25 (Sept. 25, 2000), at http://ebusiness.mit.edu/research/papers/SRO_TPRC_2000.pdf.

Michigan Commissioner Nelson warned of the same problem in testimony before the Subcommittee on Telecommunications and the Internet of the House of Representatives. Nelson Testimony, *supra* note 165, at 20 ("Although the issue of 'open access' has been debated largely as a question of fairness among different kinds of broadband providers, the restriction on user access and its effect on an informed citizenship is an issue of real significance in a democratic society.").

offer the same service). The FCC seems to equate information service with Internet service. Information service providers, however, are not limited to Internet service providers. There are many types of applications that can be provided over broadband platforms, and providers of such application services all depend on broadband access. Indeed, as Professor Dibadj has written, competition from such would-be providers is stifled by cable companies who starve these potential users and their customers of the bandwidth needed to take advantage of developing technologies.³²⁰ Even among ISPs, however, differences abound. For example, there are some that provide their own proprietary content. Additionally, technical support service quality may vary widely, and they may have different policies on spam control, virus protection, the number of available email addresses, access to newsgroups, the availability of personal webspace, etc.³²¹ There is also a public interest in protecting small businesses responsive to local concerns.³²² All of these differences may matter to the consumer if given the choice.

Even if all information service providers were in fact fungible, consumers would nonetheless be concerned about price. In this respect, the differences between FERC's and the FCC's policies are stark. There is, in fact, no difference between the services provided by competing gas suppliers: they all place natural gas into a pipeline, and it is then

320. Dibadj, *supra* note 177, at 274.

321. A quick comparison of the websites of various ISPs shows these differences. Compare AOL, http://www.aol.com/price_plans/dialup_unlimited.adp (last visited February 4, 2005), with Earthlink, <https://store.earthlink.net/cgi-bin/wsisa.dll/store/product.html?product=unlimited&deal=soDial995> (last visited Feb. 4, 2005), with DSL Extreme, <https://secure.dslxtreme.com/Medusa/Dialup/> (last visited Feb. 4, 2005), and with Comcast, <http://www.comcast.net/virtualtour/default.jsp> (last visited Feb. 4, 2005).

322. See SBA Comments, *supra* note 316. Like the SBA, which has expressed concern that regulation be preserved in order to protect the interests of small businesses, Seventh Circuit Judge Richard Cudahy (one of the judges on the *Brand X* panel), discussing retail electric competition, has cautioned in sentiments that appear equally applicable to the FCC's rush to deregulate in the ostensible interests of competition, that the goal of regulation is to protect broader public interests than the control of monopoly power:

Over the years, the idea of businesses affected with a public interest became linked with the concept of monopoly. To the extent this linkage assumed importance under economic theory, direct regulation began to be thought of necessary to discipline monopolies. . . . However, *Munn* [*Munn v. Illinois*, 94 U.S. 113 (1877)] and its progeny essentially justify regulation on the basis of the nature of the activity and not exclusively upon its monopoly characteristics. This view is insufficiently considered today. There can be regulation of the electric power industry not simply because it is a natural monopoly (although there are some authorities who continue to believe that it is just that), but essentially because it is a foundational industry, furnishing the nerves and sinew of the body politic.

Hon. Richard Cudahy, *Retail Wheeling: Is this Revolution Necessary?*, 15 ENERGY L.J. 351, 360-361 (1994).

commingled before the consumer takes delivery of a completely fungible quantity of natural gas out of the other end of the pipeline. The gas that the consumer receives is almost certainly not the same gas that the supplier put into the pipeline.³²³ Electricity sales are made the same way. The supplier injects a power supply into the grid, and the customer takes an equivalent supply of electrons—almost certainly generated at some other location—at the point of delivery.³²⁴ Competition among suppliers is based on the price terms for what they sell. Despite the fungible nature of electricity and natural gas, FERC has determined that competition among suppliers of these services should be encouraged in the hope that it will result in the production of gas and electricity at lower cost and that consumers will benefit in the process.

One final, but equally important point about downstream competition, particularly on cable systems, bears discussion. Cable companies oppose open access not only to protect their Internet service operations, but because open access threatens their market dominance in the delivery of video programming.

As MIT Professor Jerry A. Hausman details in his October 28, 1998, affidavit submitted to the FCC,³²⁵ cable companies have significant market power in the delivery of video programming over high-speed, multi-channel distribution networks. This market power, he notes, makes it profitable for cable companies to tie the delivery service to the provision of service provided by their unregulated ISPs.³²⁶ Cable company market power in the delivery of video programming is what led Congress to pass the Cable Act of 1984³²⁷ and formed the predicate for the leased access and

323. Nat'l Fuel Gas Distribution Corp., 93 F.E.R.C. ¶ 61,276, at 61,898 (2000).

324. See *New York v. FERC*, 535 U.S. 1, (2002). "[E]nergy flowing onto a power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid." *Id.* at 7-8 n.5 (citations omitted). See also *Fort Pierce Util. Auth. v. FERC*, 730 F.2d 778, 782 (D.C. Cir. 1984) ("A transmission network functions more like a reservoir: a given amount of power enters the system at one point and a like amount is delivered at another point.").

325. Joint Applications of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries, *Comments of America Online*, CS Dkt. No. 98-178, Appendix B (Declaration of Jerry Hausman, MacDonald Professor of Economics, Massachusetts Institute of Technology) (Oct. 29, 1998), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6005542356.

326. *Id.* See also *Third-Generation Internet*, *supra* note 198, at 497-507; MacKie-Mason Report, *supra* note 198.

327. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). *Third-Generation Internet*, *supra* note 198, at 13-26; MacKie-Mason Report, *supra* note 198.

must-carry provisions of the 1992 Cable Act.³²⁸

What does Internet service have to do with cable company dominance over video programming? Internet protocol technology makes it possible to deliver high-quality, full-motion video with a high-speed Internet connection.³²⁹ Most cable bandwidth, however, is used to deliver video programming.³³⁰ Cable companies have made little secret of their intention to limit Internet-based competition for their lucrative video programming services: they plainly fear it. At a television forum several years ago, Leo J. Hindrey, Jr., former CEO of AT&T Broadband and Internet Services, stated that he would not allow streaming video to undercut AT&T's cable business:

I am not going to allow it to trash the fundamental model without being a participant in the debate as to how it evolves I am not against streaming, but I am against streaming that destroys the business that I have spent billions and billions of dollars, tens of billions building. So I am not going to let that happen. That would be foolish.³³¹

Not long after Mr. Hindrey's departure, his successor, Mr. Daniel Somers, made the same point. He described AT&T's opposition to the use of its cable lines to transmit Internet-based movies and TV shows as follows: "AT&T didn't spend \$56 billion to get into the cable business to have the blood sucked out of our vein."³³² Another commentator adds, "The irony, of course, [given AT&T's exit from the cable business] is that without competition, cable operators will have an incentive to invest inefficiently—in closed proprietary networks."³³³ With access to sufficient bandwidth, on the other hand, video provided over the Internet could be comparable to that offered by TV stations, the very programming also distributed by cable systems.³³⁴ This type of competition, by definition, can

328. Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). See also Dibadj, *supra* note 177, at 254.

329. See Declaratory Ruling that Internet Serv. Providers Are Entitled to Leased Access to Cable Facilities under Section 612 of the Communications Act of 1934, *Affidavit of William Shapiro*, case Id CSR-5407-L, para. 11 (2000) (on file with Author) [hereinafter *Affidavit of William Shapiro*].

330. Cable broadband is typically assigned to a single channel. See Dibadj, *supra* note 177, at 274. It is no surprise, therefore, that with scores of channels, most cable revenue comes from video programming. *Id.* at 283 ("Video revenues are anywhere from ten to twenty times greater than broadband revenues.").

331. Ted Hearn, *AT&T's Hindrey: Streamed Video Could Trash Cable*, MULTICHANNEL NEWS 25 (Oct. 4, 1999).

332. See David Lieberman, *Media Giants' Net Change: Major Companies Establish Strong Foothold Online*, USA TODAY, Dec. 14, 1999, at B2.

333. Dibadj, *supra* note 177, at 288.

334. Intel, for example, began working several years ago with NBC, PBS, and others to

never develop on closed cable systems.

2. Differences in the Regulatory Regimes Administered by FERC and the FCC Do Not Explain Their Different Approaches to Network Access Issues

Section 706(a) of the 1996 Act charges the FCC and state commissions to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability [what the FCC has termed “broadband”] to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.³³⁵

The Act also directs the FCC to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment,” if necessary.³³⁶ The statute also declares it to be the “policy of the United States to encourage the provision of new technologies and services to the public.”³³⁷ The Act also requires that the FCC forbear from regulation where certain conditions are met, essentially where the agency finds sufficient competition to ensure that regulation is not needed to protect competitors and consumers against unreasonable or discriminatory rates, practices, or terms of service.³³⁸ There are no counterpart provisions

provide Web pages over the vertical blanking interval (“VBI”) of a regular broadcast or cable television transmission. InterCast could provide statistics with sporting events, recipes with a cooking show, print information with a news report, or coupons with advertisements. *Affidavit of William Shapiro, supra* note 329, at paras. 4, 9, and 11. “PBS ran its first InterCast programming on November 10 and 11, 1998, in a Ken Burns documentary about Frank Lloyd Wright that featured accompanying data streams for the personal computer that were transmitted simultaneously with the show.” *Id.* at para. 9.

335. Telecommunications Act of 1996 § 706(a), 47 U.S.C. § 157(a) (2002).

336. Telecommunications Act of 1996 § 706(b), Pub. L. No. 104-104, 110 Stat. 153. As the FCC has acknowledged, the directive “does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.” Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order*, 13 F.C.C.R. 24,012, para. 69 (1988). Rather it “directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.” *Id.*

337. 47 U.S.C. § 157(a).

338. The relevant portions of the section provide:

(a) Regulatory flexibility. Notwithstanding section 332(c)(1)(A) of this Act, the Commission *shall* forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its

in either the FPA or the NGA. Can these or other differences in the statutory schemes justify FCC inaction on access issues in the absence of effective intermodal or intramodal competition among broadband providers? This section of the Article explores whether the structure of the 1996 Act sufficiently distinguishes the wildly disparate regulatory approaches of the two agencies. In particular, it examines whether (1) differences in agency objectives and regulatory tools to encourage infrastructure deployment, (2) differences in the regulatory consequences of bundling of regulated and unregulated services, and (3) differences in prohibitions on the exercise of market power, the treatment of discriminatory practices, or affiliate abuses can explain the FCC's policies. As discussed below, the differences are trivial or non-substantive and suggest that the FCC's policy is faith-based, not fact-based in nature.

a. Statutory Mechanisms for Encouraging Infrastructure Deployment and the FCC's Faith-Based Reliance on Deregulation as an Incentive for Broadband Deployment

The 1996 Act, as noted above, contains a specific directive requiring the FCC and the states to encourage broadband deployment. While there is no comparable provision in either the NGA or FPA, both statutes have been held to contain general directives to FERC to ensure the adequate supply, respectively, of natural gas and electricity at reasonable prices.³³⁹ As

or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed. In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services that determination may be the basis for a Commission finding that forbearance is in the public interest.

47 U.S.C. § 160.

339. "The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978). Two purposes of the Department of Energy Organization Act ("DOE Act") are "[t]o promote the interest of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost," and "to foster and assure competition among parties engaged in the supply of energy and fuels." Department of Energy

important, the authority of both agencies to set just and reasonable rates for the services they regulate is itself an important tool to encourage infrastructure development. To date, the FCC's approach to encouraging broadband deployment has been driven, not by critical analysis of the need for incentive mechanisms and their potential efficacy, but by a sort of faith-based belief that broadband providers will invest the necessary capital if the FCC will desist from regulating them. However, there are other more rational and measured approaches permitted by statute.

Just and reasonable rates have historically referred to rates based on cost, but both agencies have been given the latitude to develop pricing policies or light-handed regulation intended to encourage needed investment in infrastructure.³⁴⁰ Thus, even where the supplier has market power, the agency may consider authorizing higher return allowances tied to a specific regulatory objective, but it must "see to it that the increase is in fact needed, and is no more than is needed, for the purpose."³⁴¹

The FCC has emphasized its concern that there must be adequate infrastructure to ensure the widespread availability of broadband. But it is no understatement to say that FERC also has been concerned about the availability of adequate transmission and pipeline infrastructure—not merely for its own sake, but to ensure reasonable prices for the services sold over pipelines and wires. "Under the NGA," for example, FERC has stated that it

is charged with furthering the public interest in authorizing the construction and operation of interstate natural gas pipelines. This entails consideration of many interests and goals. As Congress, the Commission, and the courts have interpreted it over the decades, this

Organization Act, 42 U.S.C. § 7112(9), (12) (1997). *See also* NAACP v. FPC, 520 F.2d 432 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976).

340. *See* Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 36128, 36179 (Aug. 3, 1992); Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, *Order No. 636-A*, FERC Stats. & Regs., Regs. Preambles Jan. 1991-June 1996, ¶ 30,950, at 30,611 (1992) (stating that "changing characteristics of regulated industries may justify an agency's decision to take a new approach to determining just and reasonable rates," including greater reliance on market forces) (citing *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984)); *Wold Comm., Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (approving FCC reliance on market forces in entertainment programming); *W. Union Tel. Co. v. FCC*, 674 F.2d 160 (2d Cir. 1982).

341. *Farmers Union Cent. Exch. Inc. v. FERC*, 734 F.2d 1486, 1503 (quoting *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955)). As the District of Columbia Circuit has also noted, it is not reasonable to adopt an "industry-wide solution for a problem that exists only in isolated pockets." *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981, 1019 (D.C. Cir. 1987). *See also* *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320 (D.C. Cir. 1991).

mission includes, among other things, the assurance of adequate supplies of natural gas to consumers, and the assurance of adequate competition among suppliers to cut costs and improve market conditions for the benefits of consumers.³⁴²

In other words, construction of adequate pipeline capacity is seen as a factor in assuring reasonable prices for the downstream commodity.

With respect to electric transmission, FERC has observed that the open access policies it was promoting were placing stress on the existing infrastructure that had been built in a largely monopoly-based system.³⁴³ Its concerns about these stresses proved prescient. In August 2003, the northeastern United States and Canada suffered the largest power blackout in nearly forty years.³⁴⁴ FERC's concerns about infrastructure investment did not lead it, in contrast to the FCC, to retrench on open access. Instead, FERC sought to encourage investment with regulatory incentives like increased return allowances. Order No. 2000 made clear, however, that allowing an increased return on equity ("ROE") was not meant to enhance the revenues of transmission owners at the expense of transmission customers.³⁴⁵ Nor was innovative transmission pricing to take the place of traditional cost-based ratemaking.³⁴⁶ In fact, FERC stated that transmission

342. *Islander E. Pipeline Co., L.L.C.*, 100 F.E.R.C. ¶ 61,276, 62,108 (2002).

343. *Order No. 2000 Preambles*, *supra* note 249, at 30,997-98.

As FERC there stated:

Because of the changes in the structure of the electric industry, the transmission grid is now being used more intensively and in different ways than in the past. The Commission is concerned that the traditional approaches to operating the grid are showing signs of strain. According to the North American Electric Reliability Council (NERC), 'the adequacy of the bulk transmission system has been challenged to support the movement of power in unprecedented amounts and in unexpected directions.' These changes in the use of the transmission system 'will test the electric industry's ability to maintain system security in operating the transmission system under conditions for which it was not planned or designed.'

Id. (citations omitted).

344. Jay Apt & Lester B. Lave, *Blackouts Are Inevitable*, WASH. POST, Aug. 10, 2004, at A 19, available at <http://www.washingtonpost.com/wp-dyn/articles/A52952-2004Aug9.html>. The authors are careful to point out that, "while transmission investments are required to make deregulated electricity markets work, they will not prevent future blackouts." *Id.* The article urges caution about the approaches to reliability that seek as their goal the prevention of blackouts—a futile undertaking—and instead urge smart, cost effective choices that will minimize the effects of inevitable blackouts. The FCC would do well to weigh similarly the goal of universal broadband availability against its cost in lost competition among information service providers. Targeted incentives to encourage deployment without sacrificing downstream competition are more likely to benefit the public.

345. *Order No. 2000*, *supra* note 79; *Order No. 2000 Preambles*, *supra* note 249, at 31,173; Regional Transmission Organizations, *Order No. 2000-A*, 65 Fed. Reg. 12,088 (Feb. 25, 2000).

346. *Order No. 2000 Preambles*, *supra* note 249, at 31,173.

prices must reflect the costs of providing the service.³⁴⁷ Part of the required filing for an incentive rate, therefore, is an analysis demonstrating that the incentive rate would provide benefits outweighing its costs.³⁴⁸ In recent years, FERC has employed this power to encourage both the construction of new transmission capacity and to encourage investment in transmission companies wholly independent of power suppliers and users.³⁴⁹

The FCC has this same power.³⁵⁰ Like FERC, moreover, the FCC is bound to consider the anticompetitive consequences of a particular regulatory action against the stated regulatory objective.³⁵¹ For its part, FERC has long applied a “least competitively restrictive alternative” test to proposals that are purported to serve some regulatory objective against their potential anticompetitive effect.³⁵² Other regulatory agencies enforcing similar regulatory regimes have done likewise.³⁵³

347. *Id.*

348. *See* 18 C.F.R. § 35.34(e)(1)(ii) (2004).

349. *See* Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid, 102 F.E.R.C. ¶ 61,032, at 61,061 (2003). In the Policy Statement, FERC proposed a new pricing policy that would provide added rate incentives for transmission owners (“TOs”) that (1) transfer operational control of their transmission facilities to a Regional Transmission Organization (“RTO”), (2) form independent transmission companies (“ITCs”) within RTOs, or (3) construct facilities that would expand the transmission grid. *Id.* The Policy Statement has come under fire from state public utility commissions and others as too generous to transmission owners—providing them with incentives for actions already undertaken or for investments that would have been undertaken without the incentives. *See, e.g.,* Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid, *Comments of the New England Conference of Public Utilities Commissioners*, Dkt. No. PL03-1-000, (Mar. 13, 2003), at <http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=9657066:0>.

The concern of the state commissions was based on three factors. First, FERC itself held that incentive rates must be prospective because “a ‘reward’ for past behavior does not induce future efficiency and benefit consumers.” Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utils., *Policy Statement for Incentive Regulation*, 61 F.E.R.C. ¶ 61,168, at 61,599 (1992). Second, they pointed out, rewarding a transmission owner for something it is already required to do, or would have done anyway, is not permitted under Order No. 2000. *See, e.g.,* New England Power Pool, 97 F.E.R.C. ¶ 61,093, at 61,477 (2001). Third, case law had indicated that FERC was required to demonstrate that any incentive it chooses must be rationally related to the stated purpose and no more than necessary to achieve it. *See, e.g.,* Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1503 (D.C. Cir. 1984).

350. *See, e.g.,* United States v. FCC, 652 F.2d 72, 86 (D.C. Cir. 1980) (en banc).

351. Like the FERC, the FCC is not required to develop strictly cost-based rates. Nat’l Ass’n of Regulating Util. Comm’rs v. FCC, 737 F.2d 1095, 1137 (D.C. Cir. 1984); Nat’l Rural Telcom Ass’n v. FCC, 988 F.2d 174, 182-83 (D.C. Cir. 1993).

352. Florida Power & Light Co., *Opinion and Order Reversing Initial Decision and Rejecting Tariff Availability Limitations*, 8 F.E.R.C. ¶ 61,121 (1979).

353. Fed. Mar. Comm’n. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 246 (1968) (upholding agency policy placing the burden on the applicant to demonstrate the need for anticompetitive restraints as an “appropriate refinement of the statutory ‘public

There is no obvious reason, given the availability of incentive ratemaking tools, to believe that relaxing access regulation is the only way to encourage broadband deployment. Yet, the FCC's policy seems to have ignored other less competitively restrictive tools available to accomplish the same regulatory objectives. Indeed, given the inherent incentives of intermodal competition, many commentators have questioned whether *any* special measures are needed to encourage broadband deployment, much less de facto deregulation of access.³⁵⁴ At least one commentator has pointed out with meticulous documentation that the low level of broadband deployment is the fault of ILECs that promised numerous state utility regulators fiber to the premises and broadband connections to schools and hospitals; secured looser state regulation to fund it; and then pocketed the billions of additional dollars they earned instead of upgrading facilities.³⁵⁵

To be sure, the FCC's *Wireline Broadband NPRM* does not address these questions, concluding, as a matter of statutory interpretation that "where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications, and not a telecommunications service" and the entire conglomeration becomes an unregulated interstate information service.³⁵⁶ But, the fact is, the FCC does not seem inclined to ask the questions about the necessity for forbearing anyway. On the contrary, its rationale for abandoning the *Computer II* framework was that its *Computer II* analysis assumed that the telephone network was the sole alternative for

interest' standard"). See also *Marine Space Enclosures v. Fed. Mar. Comm'n*, 420 F.2d 577, 585 (D.C. Cir. 1969).

354. *Broadband Policy and the Future of American Information Technology: Before the Comm. on Commerce, Science, & Transportation*, 109th Cong. (2004) (testimony of Dr. Charles H. Ferguson, Brookings Institution, available at <http://www.brook.edu/views/testimony/20040428.htm>). Third-Generation Internet, *supra* note 198; MacKie-Mason Report, *supra* note 198; and *Horizontal Leap Forward*, *supra* note 106. One commentator has aptly observed, for example, that while DSL technology has existed for many years, the ILECs did not deploy it, fearing it would "cannibalize" their highly lucrative T-1 business. See Dibadj, *supra* note 177, at 273. T-1 service, however, was prohibitively expensive for residential users, and it took the introduction of cable modem service to prod ILECs to develop DSL offerings. *Id.* at 283 n.157.

355. Bruce Kushnick, NetAction, *How the Bells Stole America's Digital Future*, White Paper (June 22, 2000), at <http://www.netaction.org/broadband/bells/>; Bruce Kushnick, TeleTruth, *Universal Broadband Access by Verizon? Waiting for Godot is More Useful*, at <http://www.newnetworks.com/universalbroadbandaccessbyverizon.htm> (last visited Feb. 4, 2005). See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Reply Comments of TeleTruth and New Networks Institute*, GN Dkt. No. 04-54, (May 24, 2004), at <http://www.teletruth.org/docs/706Dataqualityactreplycomments.pdf>.

356. *Wireline Broadband NPRM*, *supra* note 10, at para. 25; see also *supra*, at paras. 17-24.

information providers, whereas now there are a “variety of network platforms” they can use.³⁵⁷ In other words, the FCC has assumed away the very access problem that prodded its adoption of *Computer II*.³⁵⁸

Although the FCC’s *Wireline Broadband NPRM* ignores the issue of alternative means to promote broadband deployment, the agency *did* have a reason and an opportunity to address the issue of deployment incentives in its *Cable Modem NPRM*. Reflecting its uncertainty about the legal underpinnings of its Declaratory Order (an order that relied on the same analysis it employed in the *Wireline Broadband NPRM*), the FCC’s companion *Cable Modem NRPM* (contained in the same document as the Declaratory Order) declared its tentative determination that, if the transmission component of cable modem service is a transmission service, it would forbear from regulating.³⁵⁹ Despite extensive comments filed previously in the *Cable Modem NOI* from those questioning the need for forbearance to encourage broadband deployment, however,³⁶⁰ the *NPRM* contained no discussion of this issue at all.³⁶¹ Given the evidence of

357. *Wireline Broadband NPRM*, *supra* note 10, at para. 36. As the FCC explained in its *Wireline Broadband NPRM*:

[T]he technological evolution that enabled other network platforms to be used to provide information service enabled cable, wireless and satellite providers to begin to compete with the telephone network. In the broadband arena, the competition between cable and telephone companies is particularly pronounced, with cable modem platforms enjoying an early lead in deployment. In the context of this competition, telephone companies and various Internet and technology companies have begun to advocate that the Commission take steps that, to the extent the Act allows, would reduce the regulatory burdens and regulatory uncertainties the telephone companies face, and thereby provide incentives for those companies to continue or accelerate their investments in critical broadband infrastructure.

Id. at para. 37.

358. It is true, as the FCC has noted, that cable systems may voluntarily make access available. *Cable Modem Declaratory Ruling*, *supra* note 1, at para. 26. But it is a questionable strategy indeed to rely on such voluntary decisions by companies with inherent interests against cooperation. As FERC noted, “The ability to spend time and resources litigating the rates, terms and conditions of transmission access is not equivalent to an enforceable voluntary offer to provide comparable service under known rates, terms and conditions.” *Hermiston Generating Co.*, 69 F.E.R.C. ¶ 61,035, at 61,165 (1994).

359. *Cable Modem Declaratory Ruling*, *supra* note 1. The National Association of State Regulatory Commissioners (“NASRC”) has taken the position that the FCC’s classification of cable modem and bundled DSL services as “information services” will undermine the efforts of the states—also commanded by Section 706 to encourage broadband deployment—to promote broadband investment. Nelson Testimony, *supra* note 165, at 17. See also E-mail from Robert Nelson, Comm’r, to Harvey Reiter (Jan. 13, 2005) (on file with author) (noting NARUC’s further concern that “classifying broadband services as information services would not only undermine deployment policies but would also result in the loss of consumer protections for captive customers.”).

360. See Mackie-Mason, *supra* note 198; *Third-Generation Internet*, *supra* note 198.

361. The FCC devotes a grand total of one paragraph to its conclusion that it should

extremely high concentration present in broadband markets, the FCC's indifference is nearly impossible to fathom.

What conclusions can be drawn from this? The FCC itself has declared, "First and foremost, the Telecommunications Act of 1996 introduced a mandate that the Commission promote competition, deregulation and innovation wherever possible in the communications market."³⁶² It seems odd, given the Commission's own perception of its mandate, that it should have determined that its near-exclusive obligation is to promote competition among broadband platforms, not among information service providers.³⁶³ As Richard Whitt has commented in a

forbear from regulating cable modem service. See *Cable Modem Declaratory Order*, *supra* note 1, at para. 95. The entirety of its explanation, in fact, is encapsulated in three unenlightening sentences:

Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing. For these same reasons we tentatively conclude that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory.

Id. There is no discussion of the limited nature of intermodal competition from other platforms that the FCC itself noted elsewhere, nor any analysis of the impact of forbearance on the rates paid for broadband access. Also conspicuous by its absence is any mention of the impact of forbearance on competition among information service providers.

The Commission's tentative forbearance decision in the Cable Modem proceedings make it fair to question whether the FCC's Wireline NPRM, like its cable modem forbearance decision, is more an example of result-oriented policymaking than a decision driven by statutory text. After all, the NPRM itself reflects an abrupt about-face from the FCC's longstanding *Computer II* interpretation of its authority.

362. Wireline Broadband NRPM, *supra* note 10, at para. 35.

363. The FCC's Cable Modem Declaratory Ruling makes its priorities quite clear:

In considering the issues before us we are guided by several overarching principles. First, consistent with statutory mandates, the Commission's primary policy goal is to "encourage the ubiquitous availability of broadband to all Americans." Section 706 of the Telecommunications Act of 1996 . . . charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment." Moreover, consistent with section 230(b)(2) of the Act, we seek "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

Second, we believe "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation. And we consider how best to limit

recent article, information service providers, not the owners of the wires, have been the source of the greatest innovations in the industry.³⁶⁴ The FCC's apparent disregard for the use of other regulatory tools to balance the interests in infrastructure deployment and the protection of downstream competition stands in direct contrast to FERC's more traditional approach.

b. The FCC's "Bundling" Rationale for Deregulation

In its *Cable Modem Declaratory Ruling* and again in its *Wireline Broadband NPRM*, the FCC posits that, under the language of the 1996 Act, once an unregulated information service is integrated with a transmission component, the transmission is no longer a distinct regulated service. Rather, the whole service is now unregulated. Putting aside for a moment that this interpretation is itself a departure from the FCC's policy under *Computer II*,³⁶⁵ as well as its 1998 interpretation of the 1996 Act as applied to DSL,³⁶⁶ how does this interpretation of the Act square with FERC regulation under the FPA or NGA? There is no direct analog under

unnecessary and unduly burdensome regulatory costs.

Third, in this proceeding, as well as in a related proceeding concerning broadband access to the Internet over domestic wireline facilities, we seek to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures. We recognize that residential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite. By promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met. We strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.

Cable Modem Declaratory Ruling, *supra* note 1, at paras. 4-6 (citations omitted).

364. See *Horizontal Leap Forward*, *supra* note 106, at 599.

365. It is also a departure from the District of Columbia Circuit's interpretation of the consent decree that governed the Bell System divestiture, which adopts the same definition of "information services" later adopted in the 1996 Act. Compare *United States v. AT&T*, 552 F.Supp. 131, 229 (1982), with 47 U.S.C. § 153(20). That decree prohibited the Bell Operating Companies ("BOCs") from providing "interexchange telecommunications services." *Id.* at 227. Responding to a BOC argument that such services could be offered if they were bundled with an information service, the court held:

We think appellants urge a rather strained interpretation of the language of the decree. Under their view, interexchange service, no matter how extensive, could be provided by the BOCs by simply packaging that service with some other noninterexchange telecommunications or even nontelecommunications service. That interpretation, it seems rather obvious, would create an enormous loophole in the core restriction of the decree. To be sure, information services, of which the gateway proposal appears to be a variant, may well shortly be removed from the decree's coverage. Nevertheless, when information services are, as here, bundled with leased interexchange lines, the activity is covered by the decree.

United States v. W. Elec. Co., 907 F.2d 160, 163 (D.C. Cir. 1990) (citation omitted).

366. Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, memorandum opinion and order, 13 F.C.C.R. 24,012, paras. 34-35 (1998).

the FPA—both transmission and sales for resale of electricity are regulated services. There is, however, a direct analogy under the NGA. NGA regulation extends to transportation of natural gas in interstate commerce. FERC does not regulate the price of direct sales of natural gas to consumers and, after NGA amendments enacted in 1978 and 1992, does not regulate “first sales” of natural gas at wholesale either.³⁶⁷

What is most striking about the FCC’s position is not merely that it is such a dramatic reversal of longstanding agency policy, but that it proposes what FERC has condemned as regulatory circumvention when attempted by regulated utilities. The notion that a regulated provider of transportation service can avoid the reach of federal regulation by the artifice of bundling that service with an unregulated service was long ago rejected by the United States Supreme Court in *Federal Power Commission v. Louisiana Power & Light Company*,³⁶⁸ a case decided under similar provisions of the NGA. Under the provisions of that Act, the FPC was granted authority to regulate the interstate transportation of natural gas, but was given no authority to regulate the direct sale of natural gas to consumers.³⁶⁹ The interstate pipeline company in that case had entered into an agreement with an electric utility to sell natural gas directly to the utility for consumption in its generating plants. When the FPC, which was concerned at the time about the use of scarce natural gas in electric utility boilers, imposed limits on the transportation of natural gas to end-users engaged in less-favored uses of natural gas like electric generation, the end-user challenged the agency’s action.³⁷⁰

According to *Louisiana Power & Light Company*, the FPC lacked

367. “First sales” of natural gas are sales for resale by the gas producer to a reseller, either a pipeline or a gas marketer. 15 U.S.C. § 3301(21). Certain classes of natural gas were exempted from first sale regulation in the Natural Gas Policy Act of 1978. 54 Fed. Reg. 51,902 (Dec. 19, 1989) (codified at 18 C.F.R. pt. 272); Proposal Implementing the Natural Gas Wellhead Decontrol Act of 1989, *Notice of Proposed Rulemaking*, FERC Stats. & Regs., Proposed Regs. 1988-1998 ¶ 32,469, at 32,348 (1989). The proposal stated:

Title I of the NGPA defined various categories of natural gas production and prescribed the maximum lawful price (“MLP”) that could be charged for ‘first sales’ of each category. Section 121 of the NGPA provided for the phased, partial decontrol of wellhead sales. Certain high-cost natural gas as defined in sections 107(c)(1)-(4) was deregulated on November 1, 1979. New natural gas as defined in section 102(c), certain new onshore production wells as defined in section 103(c), and some intrastate gas was deregulated on January 1, 1985. Gas from new onshore production wells completed at a depth of 5,000 feet or less was deregulated on July 1, 1987 if the gas was not committed or dedicated to interstate commerce on April 20, 1977.

Id. at 32,348. Later, Congress deregulated all first sales of natural gas under the Natural Gas Wellhead Decontrol Act. *Id.* at 32,349.

368. 406 U.S. 621 (1972).

369. *Id.* at 636.

370. *Id.* at 623-38.

authority to regulate the transportation of natural gas to end-users because the pipeline was offering a single service—the sale of natural gas to end-users—that the FPC had no authority to regulate.³⁷¹ The Court disagreed, affirming the FPC's assertion of jurisdiction over the transportation component of the bundled arrangement.³⁷²

Mississippi River Transmission Corporation v. Federal Energy Regulatory Commission,³⁷³ is to similar effect. There, the District of Columbia Circuit upheld FERC's jurisdiction to regulate interstate transportation of natural gas sold under a bundled arrangement. Specifically, "FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute."³⁷⁴

Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

As far as the statute is concerned, there would have been no doubt of FERC's Section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. *To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation.* Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges.³⁷⁵

The facts in *Louisiana Power & Light* and in *Mississippi River* are directly analogous to the bundling of information services with transmission. Like the interstate pipelines in these cases, the cable companies argued in the *Cable Modem NOI* that by the artifice of bundling cable modem transport service with unregulated information service (i.e., Internet service) they had succeeded in fashioning an unregulated information service that just happens to be delivered over cable lines.³⁷⁶

What is so starkly different is that the FCC, rather than rejecting this line of argument, as had the FERC and its predecessor, adopted the argument as its own. What is also noteworthy is that the FCC's earlier reasoning for adopting the *Computer II* rationale it has now eschewed is so similar to FERC's

371. *Id.* at 628.

372. *Id.* at 640-42.

373. 969 F.2d 1215 (D.C. Cir. 1992).

374. *Id.* at 1217.

375. *Id.* at 1218 (emphasis added).

376. See *supra* text accompanying notes 36-50, 55-82.

reasoning. As the FCC explained its concern in a post-*Computer III* order, a common carrier "would be able to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result."³⁷⁷

III. CONCLUSION AND RECOMMENDATIONS

The central purpose of the *Computer II* requirement for unbundling communications and information service was to prevent carriers from discriminating in favor of their own information services over those offered by competitors by denying them access to needed telecommunications facilities.³⁷⁸ That objective is as valid today as it was when adopted. It is also FERC's core rationale for ordering the unbundling of gas and electric sales from transportation and transmission, respectively, in Order Nos. 636 and 888.³⁷⁹ While in *Computer III* the FCC replaced the structural separation requirements of *Computer II* with nonstructural safeguards, it reaffirmed that facilities-based carriers would still have to acquire transmission capacity for their own enhanced (now information) services under the same tariffs applicable to independent enhanced service providers.³⁸⁰ Even after enactment of the Telecommunications Act, the FCC held that the *Computer II* requirements would continue to apply to the provision of information services.³⁸¹ *Computer II* type rules, it held, are

377. *AT&T InterSpan Order*, *supra* note 128, at para. 44.

378. *California v. FCC*, 39 F.3d. 919, 924 (9th Cir. 1994).

379. *Order No. 888*, *supra* note 16; *Order 636 Preambles*, *supra* note 21.

380. Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Report and Order*, 16 F.C.C.R. 7418, paras. 3-4 (2001) [hereinafter *CPE/Enhanced Services Bundling Order*]; see Cannon, *supra* note 110, at 200.

381. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, *First Report and Order*, 11 F.C.C.R. 21,905, paras. 130-136 (1996) [hereinafter *Non-Accounting Safeguards Order*]. See also *Wireline Broadband NPRM*, *supra* note 10, at para. 18 n.38.

Congress further specified that the term "information service" includes "electronic publishing, but does not include any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." The term "information service" follows from a distinction the Commission drew in the *First*, *Second*, and *Third Computer Inquiries* ("*Computer I*," "*Computer II*," and "*Computer III*").

Id. (citations omitted). See *Computer I*, *supra* note 107; *Computer II*, *supra* note 114; *Computer III*, *supra* note 122. That distinction was between basic data transmission service on the one hand and, on the other, a combination of that transmission and computer-mediated offerings. That combination produces "enhanced" or information services. This distinction was incorporated into the Modification of Final Judgment, which governed the BOCs after the Bell system break-up, and into the 1996 Act. Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11,501, para. 75 (1998).

“the only regulatory means by which certain independent ISPs are guaranteed nondiscriminatory access to BOC local exchange services used in the provision of intraLATA information services.”³⁸² Its about-face in the *Cable Modem Declaratory Ruling* and the *Wireline Broadband NPRM* stands in stark contrast to its former and FERC’s current approach. One commentator has described the FCC’s newfound position in scathing, but accurate terms:

[I]n its chosen deregulatory quest, the FCC has engaged in a flawed and disingenuous strategy. . . . Suddenly a telecommunications service can become stripped of its common carrier regulatory triggers if and when the FCC chooses to emphasize the content or enhancements carried via the telecommunications conduit. * * * [It has elected] to offer all telecommunications service providers the ability to free themselves of any and all common carrier burdens that otherwise would apply to broadband telecommunications service simply by characterizing these offerings as information services.³⁸³

The FCC’s *Wireline Broadband NPRM* describes its objectives regarding broadband as follows:

The promise of broadband generally, and the proliferation of broadband Internet access services specifically, are fostering the creation, adoption and use of multimedia applications that can meet consumers’ broad communications, entertainment, information, and commercial needs and desires. These factors demand that the Commission develop general principles and policy goals that form the foundation of our broadband policymaking.³⁸⁴

The Commission’s broadband goal is stated simply enough—and it makes sense. But its deregulation policy seems oblivious to the goal. Where, as Professor Dibadj notes, cable operators “have chosen to ‘starve’ broadband,”³⁸⁵ the very ISPs who will develop the applications, information, and entertainment the FCC hopes to foster are falling by the wayside. Although there are several thousand ISPs operating around the country, and although the count varies among reporting sources,³⁸⁶ their

382. Non-Accounting Safeguards Order, *supra* note 381, at 21,970-71. See also *United States v. W. Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990).

383. Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207, 233-234 (2003).

384. *Wireline Broadband NPRM*, *supra* note 10, at para 1.

385. Dibadj, *supra* note 177, at 274.

386. In August 2002, for example, the Small Business Administration estimated over 7000 ISPs nationwide. SBA Comments, *supra* note 316, at 1. See also Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, et al., *Comments of Teletruth Pertaining to the IRFAs*, FCC CC Dkt. No. 01-337, at 34 (May 3, 2002), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513190579 [hereinafter *Teletruth IRFA Comments*].

numbers have diminished significantly in recent years. Mike Jackman, Executive Director of the California ISP Association ("CISPA"), one of the nation's largest such organizations, estimates that as many as 25 percent of all ISPs have gone out of business in the last few years.³⁸⁷ Most telling, despite their still large numbers, they hold only a fraction of the market for ISP service over broadband platforms.³⁸⁸

This is no coincidence. The exclusionary policy of the cable and telecommunications companies, abetted by FCC indifference,³⁸⁹ has kept

387. Author bases these numbers on an August 19, 2004 discussion with Mike Jackman, Executive Director, CISPA. Government studies from the 1997 Census put the number at over 4000 ISPs in 1997. *Teletruth IRFA Comments*, *supra* note 386, at 33.

388. A third-quarter 2003 survey by comScore Networks reports that the two largest telephone (SBC and Verizon) and three largest cable companies (Comcast, Time Warner, and Cox) have 61 percent of the nationwide broadband market, while all other ISPs—numbering in the thousands, including affiliates of other cable and telephone companies—have the remaining 39 percent. By contrast, *none* of the telephone ("telco") or cable ISPs is among the largest holders of market share on narrowband. *See* Press Release, COMSCORE, *comScore Announces Breakthrough National and Local Market ISP Benchmarking Report* (Nov. 24, 2003), at <http://www.comscore.com/press/release.asp?press=385>. The small presence of cable and telco-affiliated ISPs on narrowband and their dominating presence on broadband certainly raises the question whether they are securing the patronage of broadband customers through the raw exercise of market power rather than on the merits of their ISP offerings. Even on Time Warner's system, ostensibly "opened" in part under the FCC's merger conditions, unaffiliated ISPs have virtually no presence. According to a complaint filed by Stic.net with the FCC in late 2003, Time Warner had approximately 95 percent of the total subscribers to the Time Warner system, Earth Link had 5 percent, and all the other ISPs "had five one hundredths of one per cent of the market." Ex Parte Submission from David Robertson, President of STIC.NET, LP, to Kenneth Ferree, Federal Communications Commission Media Bureau Chief, 1 (Sept. 22, 2003), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515287342. CISPA Executive Director Mike Jackman reports that local exchange carriers have 85 percent of the retail DSL market and upwards of 90 percent of the wholesale market. Email from Mike Jackman, Executive Director, CISPA, to Harvey Reiter (Aug. 19, 2004) (on file with Author). Michigan Commissioner Nelson testified similarly that in 2003, "Michigan and the surrounding states have . . . seen an alarming surge in SBC's dominance over the residential DSL market." Nelson Testimony, *supra* note 165 at 17.

389. While admittedly anecdotal, the FCC has received a number of informal complaints from ISPs that, even on DSL, which the FCC still treats as a regulated telecommunications service, they have not gotten a fair shake—they have been victims of price squeeze by the telecommunications companies, unfair marketing practices, discrimination in provisioning, etc. *See Teletruth IRFA Comments*, *supra* note 386, at 37-38. The Teletruth comments quote Texas Internet Service Providers Association President David Robertson's colorful recounting of a particularly unsatisfying meeting with FCC staff:

The meeting was Tuesday May 8th, 2001. In a nutshell, all the "bad acts" submitted to them to date have resulted in exactly "ZERO" dollars in fines, and little delay in their 271 approvals for the Bells to jump into the long distance market. We asked for something blatant as handwriting on a wall as to the future of the complaint process as we are approaching it. We got it. WE SHOULD EXPECT NOTHING FROM THE INFORMAL COMPLAINT PROCESS. We should expect nothing from any complaints we have submitted to date.

independent ISP's from retaining, much less expanding patronage as increasing numbers of Internet users migrate from dial-up to broadband. What can the FCC do to reverse this trend? There are a few straightforward solutions.

First, the FCC needs to return to basics. There are scores of examples of ISPs denied access to broadband and still other complaints that access, where offered, has been extended only on onerous terms and conditions.³⁹⁰ Voluntary cooperation from the cable and telecommunications companies will never be forthcoming. The FCC should do what FERC has done: look at the substantial anecdotal evidence; it reveals a dysfunctional system that hurts innovation in the development of information services. As FERC has stated:

[A]llegations of discrimination are serious because, if nothing else, they represent a perception by market participants that the market is not working fairly. If market participants perceive that other participants have an unfair advantage through their ownership or control of transmission facilities, it can inhibit their willingness to participate in the market, thus thwarting the development of robust competition.³⁹¹

The FCC should not wait for formal complaints. Most ISPs are small; they do not have the funds to mount an expensive fight over access.³⁹²

A couple of weeks ago we met with a senior person in the ENFORCEMENT BUREAU. After a one-hour meeting and receiving some heartfelt empathy for the plight of ISPs and the consumers who are being victimized by the illegal, anti-competitive behavior, I suggested that our best move might be to just jump out a window. He suggested we might want to consider throwing a chair out of the window first, so we wouldn't get cut on the glass as we jumped.

Id. at 38. The federal Small Business Administration has voiced similar concerns that the interests of small ISPs have been overlooked by the FCC. SBA Comments, *supra* note 316.

390. See, e.g., New Networks Institute for Teletruth, *The Results of the Nationwide, 4th Annual ISP Survey 4* (Apr. 25, 2003), available at <http://www.teletruth.org/docs/ISPSurvey2003.doc> (stating that 40 percent of independent ISPs do not offer Internet service over DSL "because of the Bells' predatory pricing to resellers or problems with ordering and installations"). See also Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Initial Comments of the California ISP Association, Inc.*, CC Dkt. No. 95-20 (Apr. 16, 2001), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=651256513 6.

391. *Order No. 2000*, *supra* note 79, at 818.

392. The Author makes one further observation in this regard. The FCC, as contrasted with the FERC, has a remarkably indifferent attitude towards the impact that its liberal ex parte rules have on smaller entities. A quick perusal of a typical FCC rulemaking order indicates that the comments only really begin *after* the comment period ends. Ex parte submissions sometimes account for more than half the record citations in an FCC order. It is certainly true that any party can submit an ex parte presentation, but it is also true that the

Second, the FCC should not only regulate access, it needs to adopt a structural remedy to ensure information service competitors comparable access. The structural relief might take one of two forms.

One form is that broadband providers could be barred from offering information service over their own facilities. If they are any good at the information service they provide, they will secure market share on the merits in those regions where they have no facilities-based advantage.³⁹³ At the same time, they will no longer have the incentive to discriminate in favor of their own affiliated operations.³⁹⁴

squeaky wheel gets the grease. Only the largest participants can afford the substantial expense of the face-to-face meetings with decision makers. The notices of ex parte communications are hardly informative to the smaller user. A letter describing a long meeting with key decisionmaking personnel might say no more than that the named participants "met today with the [named FCC staff] to discuss the comments filed." See, e.g., Letter from Brett Kilbourne, Director of Regulatory Services, to Marlene H. Dortch, Secretary of FCC (June 16, 2004), at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516213870. Such contacts are not entertained by FERC. When it desires more public input than the written comments provide it, FERC will often schedule regional workshops or on-the-record, post-comment conferences.

393. It hardly seems coincidental that telecommunications and cable-affiliated ISPs have small shares of the dial-up market, even in their own service areas yet have dominant market shares of ISP service over broadband on their own facilities. Discussion with James Pickrell, former President of the California ISPs Association (Jan. 9, 2005). As FERC economist Richard O'Neill noted at a June 10, 2004 FERC conference on solicitation processes for public utilities, the high success rates of affiliated power suppliers in bidding programs where they compete to supply their utility affiliates is at least a reason to be suspicious. "If they are really the best, from some combination of factors, why aren't [these same affiliated suppliers] winning in other [bidding contests outside the service area of their utility affiliates]?" Solicitation Processes for Pub. Utils., *Proceedings Before the Federal Energy Regulatory Commission*, Dkt. No. PL04-6-000 48 (June 10, 2004), at <http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10191123:0> [hereinafter *Solicitation Processes Proceedings*]. See also Mark Cooper, Consumer Federation of America, *The Public Interest in Open Communications Networks* 60-62 (July 2004).

394. A similar bar on participation by utility affiliates in Maine to supply power in the service territories of their parent utilities has, according to Maine Public Utilities Commission ("PUC") Chairman Tom Welch, worked very well. *Solicitation Processes Proceedings*, *supra* note 393, at 117.

Under Maine's electric structure, power companies bid to become the default suppliers (i.e., the supplier to customers who do not choose their own power supplier) to customers within each of the utility service territories. Subject to limited exceptions not relevant here, utility affiliates involved in power supply are forbidden to participate in the bidding to be the default supplier in their affiliate's service territories. Standard Offer Service, CODE ME. R. § 65-407-301 (Pub. Utils. Comm. 2004), available at <http://www.state.me.us/n.puc/rules/Part%203/ch-301.pdf> (last visited Jan. 11, 2005). In testimony before the FERC, Welch explained that such a bar had actually encouraged new entrants because the local utility, now only in the power delivery business, had no reason not to offer workable transmission service while sellers had more confidence that they would not be at a competitive handicap to the utility's affiliate:

We've been told that that process [exclusion of utility affiliates from the bidding process] runs more smoothly in Maine than anywhere else, because the utility has

Regarding the other possible form, as with the FERC ISO model, the FCC could encourage cable operators and wireline owners to turn control of their broadband platforms over to an independent operator. In comments filed with the FCC several years ago, economists Robert Sinclair, Keith Reutter, and Nels Pearsall urged the use of an Independent Network Operator ("INO") as a means to ensure competitive broadband Internet access. Specifically, they envisaged that the INO, much like an electric industry ISO, "would oversee the key managerial functions of the cable system relating to broadband access."³⁹⁵ Adoption of this model would increase marketplace confidence in the prospects of new Information Service Providers and new broadband-reliant applications.³⁹⁶ Independent operators, moreover, should be willing to make a more neutral assessment of customer demands for more bandwidth. They will not share the anticompetitive motivation of cable companies to limit bandwidth to protect their video programming market shares.

Third, the FCC must honor its obligation to balance its interest in accelerating broadband deployment against the anticompetitive effects on downstream competition. Its seeming obliviousness to downstream competition issues has led it to ignore alternatives to the deregulatory course it has chosen. Simply put, the FCC needs to explore less competitively restrictive means to encourage broadband. These alternatives could include adopting ratemaking incentives tied to broadband buildout, turnover of asset control to an independent operator or, if the facts justify it, simply letting intermodal competition itself serve as the incentive.³⁹⁷

Fourth, the FCC must exhibit great caution in relaxing regulation of broadband service providers. While it is not possible to rule out the existence of a workable competitive broadband market, neither is it likely any time soon. Any easing of common carrier obligations on broadband providers must rest on sound determinations that the providers lack market

no incentive to conceal anything, and the bidders have no reason to believe that the utility is concealing anything for the benefit of their own affiliates. So, I think the practical exclusion of the affiliates from the process has been a very positive factor.

Solicitation Processes Proceedings, *supra* note 393, at 117. *Cf.* Cooper, *supra* note 393, at 55-72.

395. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Comments of the Consumer and ISP Representatives on Need for Rulemaking Proceeding*, GN Dkt. No. 00-185, at Attachment A, 12 (Dec. 1, 2000) Dkt. No. GN00-185 (Dec. 1, 2000) at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159586.

396. See Cooper, *supra* note 393, at 64-66.

397. This is the preferred route of the SBA, which has urged the FCC to recognize that "it is competition that will drive the deployment of broadband." SBA Comments, *supra* note 316, at 5.

power. The FCC should eschew reliance on nearly meaningless tests like its "effective competition" test for cable market power in video programming. A more meaningful measure, for example, might be to adopt FERC's modified "pivotal supplier" test, a test for market power that recognizes that market power can be present even in a market of multiple providers.³⁹⁸

Finally, the FCC should do more to encourage intramodal competition for cable and telecommunications companies. The agency has recognized the valuable role, in particular, that municipalities can play in fostering competition for cable and telephone companies. The Supreme Court's 2004 decision in *Nixon v. Missouri Municipal League* opens the door for more states to adopt restrictive legislation keeping municipalities from providing telecommunications services, but the FCC can still act as a bully pulpit to discourage the enactment of further such state laws.³⁹⁹ It can also treat

398. See AEP, *supra* note 57. In AEP, FERC announced that it would use "both a pivotal supplier and market share analysis" to measure market power among power suppliers for purposes of determining seller eligibility for market-based rates (FERC does not permit market-based rates for transmission service). *Id.* at 61,061. FERC described its test as follows:

The pivotal supplier analysis focuses on the ability to exercise market power unilaterally. It essentially asks whether the market demand can be met absent the applicant during peak times. Thus, the pivotal supplier screen measures market power at peak times, and particularly in spot markets. If demand cannot be met without some contribution of supply by the applicant, the applicant is pivotal. In markets with very little demand elasticity, a pivotal supplier could extract significant monopoly rents during peak periods because customers have few, if any, alternatives. The uncommitted market share analysis indicates whether a supplier has a dominant position in the market, which is another indication of whether the supplier has unilateral market power and may indicate the presence of the ability to facilitate coordinated interaction with other sellers. The market share screen is also useful in measuring market power because it measures an applicant's size relative to others in the market. Thus, by using the two screens together, the Commission is able to measure market power both at peak and off-peak times, and the ability to exercise market power both unilaterally and in coordinated interaction with other sellers. Using two screens will give the Commission a more complete picture of an applicant's ability to exercise market power.

Id. Using a pivotal supplier measure of market power it would be plain that both cable operators and telecommunications companies alike have market power over broadband transmission. In nearly every market with broadband availability, no single supplier can satisfy all current demand for broadband, making *each* supplier pivotal and giving it market power as a result.

399. 541 U.S. 125 (2004). In *Missouri Municipal League*, the Supreme Court reversed a holding of the Eighth Circuit that a Missouri state law barring municipalities from offering telecommunications services was subject to preemption under Section 253 of the Communications Act, 47 U.S.C. § 253, authorizing the FCC to preempt state laws and regulations "that prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, barring states. See Reiter, *supra* note 281 at 16. Municipalities, it held, were not "entities" within the meaning of the Act, but arms of state

complaints from small ISPs more seriously and proactively. It should reconsider the limits on line-sharing imposed in its Triennial Review Order.⁴⁰⁰ Many have urged the FCC to recognize the importance of line sharing to the survival of many CLECs. It should take those protestations to heart.

There is still a vibrant information services market, but its viability is threatened by policies that allow broadband operators to choke competition. Competition among broadband suppliers will benefit all consumers and surely is to be encouraged. But the FCC should not equate encouragement of broadband deployment with deregulation of broadband services. Encouraging investment in new broadband technologies and promoting open access to broadband platforms are not mutually exclusive goals. It is not too late for the FCC to right its ship and follow the course that both it and its sister agency, the FERC, had previously charted.

government. In the underlying FCC decision (ultimately upheld by the Court) and in a prior FCC decision on a similar Texas statute, the FCC, while ruling that it was powerless to preempt state law, did emphasize its view that the legislation was unwise. *Id.*

400. On this score, at least, the Chairman is reported to have had a change of heart. An article in *USA Today* reported that the Chairman had written to fellow Commissioners Copps and Adelstein stating that "I feel strongly that line-sharing was a pro-competitive measure." Paul Davidson, *Rule That Lowered Broadband Prices May Be Revived*, *USA TODAY*, Aug. 4, 2004, at 2B, available at http://www.usatoday.com/money/industries/telecom/2004-08-03-phones_x.htm.

